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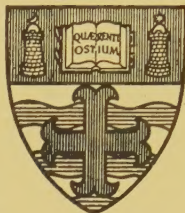
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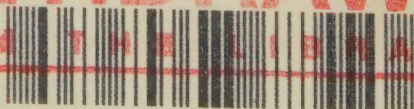
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NEGLIGENCE IN DELICT



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NEGLIGENCE IN DELICT

by

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FOREWORD

During the twelve years that have elapsed a considerable quantity of water has flowed under the legal bridge for, apart from the consolidation of the Provincial Ordinances in order to ensure uniformity of approach and treatment throughout the Republic of South Africa, this Fifth Edition includes a review of over four hundred new or further judicial decisions handed down during the past decade qualifying and expanding the rules of Negligence in a number of important aspects both in principle and in detail. These have increased the work by some one hundred pages despite endeavours to keep the book from becoming too bulky.

Apart from the usual review of the substantive law on the subject it has been deemed expedient to incorporate those aspects of adjective law which would be of considerable interest to the practitioner in regard to Notice and Prescription of Actions in the light of the terms of the Motor Vehicle Insurance Act, a subject upon which there has been no little judicial controversy.

Much of the work has been rewritten, in particular the Chapter on Damages. In the past the surviving author was assisted by the advice and constructive criticisms of the honourable Justices Ogilvie Thompson, now J.A. (in the Third Edition), and Holmes, now J.A. (in the Fourth Edition), but nowhere was he able to obtain any such friendly assistance in the compilation of this the Fifth Edition either at the Bar or at the University College of Rhodesia. Nevertheless considerable reference has been made to contributions made by the academicians in the various periodical legal publications of this country. Such contributions are assuming an ever-increasing weight and advisory authority in judicial decisions and in legislation.

The past decade has seen an increasing use of Afrikaans in the decisions of the various courts and for the citation of the pertinent dicta thereof no apology is sought, nor indeed required.

The aim of every author is, and must be, perfection, but this ideal is very seldom attained either in clarity of diction or in a complete analysis and summation of the various authorities considered and examined, however dedicated the writer may be, and, for such failings as may appear in this work, the kindly indulgence of the reader is sought.

This edition cites and includes all judicial decisions up to January, 1970.

C. NORMAN-SCOBLE

Cape Town
11/4/1970

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PART I

CHAPTER I

NEGLIGENCE—THE GENERAL CONCEPTION

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DELICTS GENERALLY

(a) DEFINITION AND CONCEPT

A delict is a civil wrong. It is the violation of a duty imposed by general rule of law, which gives to the party injured a civil remedy (Voet 47.1.1, 2).

A delict is distinguishable from a crime by the remedy, which is not a prosecution aiming at the punishment of the offender, but a civil action aiming at the recompense by way of damages or protection of the sufferer by means of an interdict (*Sandilands v. Tompkins*, 1912 A.D. at 180, and *Salzman v. Holmes*, 1914 A.D. 480). The same act may constitute both a crime and a delict; most crimes in fact are delicts as well, though the reverse is not true, but the distinction is perfectly clear. It was by no means clear to the old authorities—a fact which requires to be borne in mind when reading them. (See *Opperman v. Opperman*, 1962 (3) S.A. 40 (N).)

(b) CONTRACT AND DELICT

A delict is distinguishable from a breach of contract in that the duty which is violated is one which is imposed by general rule of substantive law and is not one based on an obligation arising from an agreement between the parties. This distinction is clear in theory. The law, by general rule, imposes on me certain duties, such as the duty not to injure others by failing to take due care; this duty does not depend on my consent—I am subjected to it whether I consent or not. But I may owe, towards a particular individual, a specific duty, such as the duty to pay him a sum of money, and this duty arises from my own choice and volition in entering into a contractual obligation. But though the distinction is clear in theory, difficulty in practice is occasioned by the fact that in some types of contract the duty may be looked on as merely a particular application of the general (delictual) duty (see *Van Wyk v. Lewis*, 1924 A.D. 438 at 443).

Although there exists in theory the clear distinction between obligations *ex contractu* and obligations *ex delicto*, that the former are obligations imposed and undertaken by agreement of the parties, while the latter are imposed by general rule of law, nevertheless the breach of a contractual duty is not infrequently, when regarded from another point of view, the breach of a delictual duty, and it is permissible for a party to rely on delict or alternatively on contract or on both delict and contract (*Pockets Holdings (Pvt.) Ltd. v. Lobels Holdings (Pvt.) Ltd.*, 1966 (4) S.A. 238 (R)). In contracts of **carriage**, for example, there is a duty to convey safely; but there is also the general duty to take due care to avoid harming others. Similarly, in contracts such as those entered into by **medical men**, the duty to exercise due care and skill may be regarded as either contractual or delictual. Yet the distinction may be of importance from two points of view. In delict, where negligence is relied on, the onus of proof is on the person alleging it, whereas in certain contracts, such as those of letting and hiring, if the property is destroyed it is for the lessee to show that it happened without his fault (*Frenkel v. Ohlsson's Breweries*, 1909 T.S. 957); compare *Weiner v. Calderbank*, 1929 T.P.D. 654; *Frocks, Ltd. v. Dent & Goodwin (Pty.) Ltd.*, 1950 (2) S.A. 717 (C) (contract of deposit); *Sulaiman v. Amardien*, 1931 C.P.D. 509 at 511; and *Marks v. Model Hire Service*, 1928 C.P.D. 476 (hire of vehicle). Again, the test for ascertaining whether

damage is too remote is, at any rate as usually stated, different in contract from what it is in tort (see *post*, p. 78).

It would appear that whenever it is necessary for the plaintiff to rely upon the actual terms of a contract, he must sue in contract, with the usual results; but that if he does not need to rely on such terms, it is open for him to sue either in contract or in tort (see, e.g., *Van Wyk v. Lewis*, 1924 A.D. at 443). If he sues in tort the onus of establishing negligence is clearly on him (*Kotze v. Johnson*, 1928 A.D. 313 at 320), irrespective of the fact that a contract existed between the parties (*Lee v. Reynolds*, 1928 E.D.L. 367 (passenger in bus injured)). It seems improbable that in respect of the amount of damage recoverable, that amount can ever be *increased* by suing in contract; it might perhaps be diminished (see *The Arpad* [1934] P. at 201, 216). If, on the other hand, the defendant's liability is limited by contract the plaintiff may ignore the contract and base his claim, and cause of action, on delict (*Hall v. Brooklands Auto Racing Club* [1933] 1 K.B. at 213). In other words where a contract defines the scope of the duty of a party to it, the other party will not be able to impose a more extended duty by suing in delict; or a more stringent degree of care than the contract calls for. Compare the discussion of the case of *United Building Soc. v. Lennon, Ltd.*, 1934 A.D. 149 at 155. Thus a claim against an attorney for his negligence is to be based on contract and not in delict (*Bruce N.O. v. Berman*, 1963 (3) S.A. 21 (T) at 23).

It may be noted that the English 'tort' is not a precise equivalent of 'delict', the former being subject to certain limitations which do not affect the latter, but in our practice the two terms are often treated as interchangeable.

(c) GENERAL DUTIES ARE NEGATIVE

A delictual duty, being imposed by rule of law, is of a general character, being imposed, not upon a particular individual, but upon all. The duty not to injure by want of due care is owed by all citizens, and the corresponding right is also general for it is enjoyed by all citizens. Now it is a characteristic of such duties that, unless imposed by statute, they are negative, and not positive. This arises almost inevitably from their general character; since it would be almost impossible for a code of law to enforce on all citizens the performance of positive duties. It is the policy of the common law to say, not 'Thou shalt', but 'Thou shalt not'. To take the familiar example—I must not push a man into the water; but if I see him drowning I am under no *legal* obligation to save him, unless I stand towards him in some special relation created by contract. See *Peri-Urban Areas Health Board v. Munarin*, 1965 (3) S.A. 367 (A.D.) at 373. This is what is meant when it is said that there is no liability for pure omission. Statute may, of course, create a duty to be active; and the case of family relationship appears to be an exception.

A general negative duty may, however, be transformed into a positive one, in consequence of some positive act; so that, as is commonly said, though there is no liability for a pure omission, there may be liability for an omission connected with a **prior act of commission**. See *Joffe & Co. v. Hoskins and another*, 1941 A.D. 431 at 452, and cf. *Page v. Malcomess & Co.*, 1922 E.D.L. 284. This question is further examined below (*post*, p. 8).

(d) DOLUS AND CULPA

The violation of a duty may be intentional or unintentional; and if it is unintentional, it may be culpable or innocent. This suggests a division of delicts into those in which *dolus* (wrongful intention) is an essential; those in which *culpa* (negligence) is sufficient; and those in which liability is absolute, irrespective of actual fault. In fact, delicts may be so grouped. The first group, in which *dolus* is essential, are the *injuriae* (defamation and assaults); these historically are extensions of the *actio injuriarum*. The second group is given the generic name of Negligence; it comprises historically the extensions of the *actio legis Aquiliae*. The third group are the Nuisances; historically they are either statutory, or are extensions of the interdicts: With them may be grouped the absolute liability for damage by animals, which is quasi-statutory. It is with the second group alone that this book is concerned; though incidental reference will be necessary to the third, especially in respect of water and of animals.

For liability for damages under the *lex Aquilia*, *culpa* (negligence) is sufficient. But, of course, the existence of *dolus* will not in any sense bar the action. It may possibly have the effect of increasing damages; for if an act is an *injuria*, as well as giving rise to an action for patrimonial loss, there would appear to be no reason why the *actio legis Aquiliae* should not be joined with the *actio injuriarum*, and damages be awarded both for patrimonial loss and for *contumelia* (see *Matthews v. Young*, 1922 A.D. 492 at 505). Further, the existence of an intention to cause certain consequences may increase damages by permitting redress in respect of those consequences which would otherwise be too remote (see *post*, p. 77). But apart from these questions it is unnecessary, in an action based on the *lex Aquilia*, to consider whether or not there was intention; since the greater includes the less, and *culpa* is sufficient to found the action. Nor is it necessary to enter upon the refinements in the conception of negligence which are so lucidly expounded by Austin, who points out that negligence may include recklessness or indifference. For the purposes of liability, it makes no difference whether consequences were intended; or were disregarded though foreseen; or were not foreseen at all though they should have been. But inasmuch as the commonest attitude of mind, included within the general conception of *culpa*, is the failure to foresee the consequences of an act (or omission), it is for practical purposes convenient to describe *culpa* as 'the failure to foresee consequences which a reasonable man should have foreseen and guarded against'. So Paulus (Dig. 9.2.31) speaks of *culpa* as '*id non provideri quod a diligente provideriit, poterit*'; vide also the remarks of Lord De Villiers C.J. in *Lennon, Ltd. v. British S.A. Co.*, 1914 A.D. 1 at 6: the court had to be satisfied that the conduct of the defendant had to be castigated as being legally blameworthy before a conclusion of *culpa* on his part could be reached (see his dictum *post*, p. 10).

It should be observed, however, that no action lies under the *lex Aquilia* if the defendant's act, though harmful to the plaintiff, was not an *injuria*, i.e. an unlawful act. It is not an *injuria* to exercise a right, unless the defendant was motivated by malice in doing so, and harmed the plaintiff deliberately (*Stern v. Podbrey*, 1947 (1) S.A. 350 (C)). In this case the defendant wished to drive out of the yard of his business premises, and his employees (who were on an unlawful strike), thinking he was about to

remove goods from his premises, sought to prevent his progress by lining up with arms linked, across the way of his motor-van. He first sought the aid of the police, who declined to intervene, and then hooted three times and called out, 'We are now moving on to the road', and then drove his van slowly forward to push the pickets aside. The plaintiff was injured. Held, that, having regard to the rule that a person who had a right to perform an act did not become liable although damage was caused to another person, unless he exceeded his right or exercised it merely for the purpose of injuring another person, the defendant was not liable in damages.

(e) STATUTORY CULPA

Culpa in its primary signification means, simply, fault. In law it means fault entailing legal liability. Clearly therefore it may be used either in a broad or in a narrow sense. In the broad sense it will include all faults which entail liability; including therein the breach of a statutory duty. But in its narrow, and more usual, sense it means only the breach of a duty of care at common law. It is in the latter sense that it is used in this book, a sense in which it is exactly equivalent to 'negligence'. Consequently, in the narrow sense the distinction between 'negligence' and '*culpa*' seems to be one rather of language than of meaning (*Mordt N.O. v. Union Govt.*, 1939 T.P.D. 103 at 106; see also the remarks of Van den Heever J.A. in *Herschel v. Mrupe*, 1954 (3) S.A. 464 (A.D.) at 484).

With regard to breaches of statutory duty, which may conveniently be described as 'statutory *culpa*' (see per Davis J. in *Bellstedt v. S.A.R. & H.*, 1936 C.P.D. 399 at 406, citing *Lochgelly Co. v. M'Mullan* [1934] A.C. 1), the question of liability in such cases **depends on the construction of the statute** (*Steenkamp v. Steyn*, 1944 A.D. 536 at 553-5); it being a matter of construction (a) whether the statute intended that there should be a civil remedy for the breach of the duty or whether the statutory sanctions should be the only remedy (*Salisbury Bottling Co. v. Central African Bottling Co.*, 1958 (1) S.A. 750 (F.S.C.) at 755) and (b) whether the plaintiff is one of the class of persons to whom the duty is owed (*ibid.*, and cf. *Joubert v. S.A.R.*, 1930 T.P.D. 154 at 158; *Hall and another v. Edward Snell & Co., Ltd.*, 1940 N.P.D. 314; *Patz v. Greene & Co.*, 1907 T.S. 427, and *Culter v. Wandsworth Stadium, Ltd.* [1949] 1 All E.R. 544 (H.L.) at 549; *Barkway v. South Wales Transport* [1950] 1 All E.R. (H.L.) at 400 (damaged tyre later bursting); *Phillips v. Britannia Hygienic Laundry* [1923] 2 K.B. 823 (C.A.) at 841; *Grant v. National Coal Board* [1956] 1 All E.R. 682 (H.L.) at 687-8; *Callinicos v. Burman*, 1963 (1) S.A. 489 (A.D.) at 498. But see *Monk v. Warbey* [1935] 1 K.B. 75 followed in *McLeod v. Buchanan* [1940] 2 All E.R. 179 (H.L.) at 186), or whether a criminal penalty is the only punishment which may be suffered (*Ellis v. Vickerman*, 1954 (3) S.A. 1001 (C)). It must also be established, of course, that the harm was directly caused by the breach of the duty. Provided these conditions are fulfilled, the question of liability is substantially the same in cases of statutory *culpa* as in cases of *culpa* at common law; subject to the question whether a defence such as *volenti non fit injuria* is available (see *post*, p. 55). *Salmond on Torts*, 9th ed., p. 497, says:

'The breach of a duty created by statute, if it results in damage to an individual, is *prima facie* a tort, now called "statutory negligence", for which an action for

damages will lie at his suit. The question, however, is in every case one of the intention of the Legislature creating the duty and no action for damages will lie if, on the true construction of the statute, the intention is that some other remedy, civil or criminal, shall be the only one available.'

Where, however, it is clear that the enactment is for the benefit of the general public as a whole, any member thereof, who is injured in his person or his property by a failure to comply with the enactment, or has been negligent in his compliance therewith, has, in the absence of any indication in the statute to the contrary, a remedy for damages sustained by him as a consequence of such breach or negligence (*London Passenger Transport Board v. Upson and another* [1949] 1 All E.R. 60 (H.L.) at 67-9). See, also, *Phillips's case* (*supra*) and *Callinicos's case* (*supra*); *C.S.A. Rly. v. Notling*, 8 S.C. 25; *Sandilands v. Tompkins*, 1912 A.D. 171 at 176; *Madrassa Anjuman Islamia v. Johannesburg Municipality*, 1917 A.D. 718; *Roodepoort-Maraiburg T.C. v. Eastern Properties*, 1933 A.D. 87; *Albert Furnishing Co. v. Stramrood*, 1936 C.P.D. 529; *Coetzee v. Fick*, 1926 T.P.D. 213; *Clarke & Wife v. Brims* [1947] 1 All E.R. 242.

On the other hand there is nothing in the Forest and Veld Conservation Act, No. 13 of 1914, nor in Govt. Notice No. 8 of 5th January, 1951, indicating that any duty has been imposed therein in the interests of any class of person or any individual and, consequently, a breach thereof does not ground an action for damages (*Ellis v. Vickerman*, 1954 (3) S.A. 1001 (C)). In this case plaintiff sued a building contractor for damage done by beetle infestation on the grounds that the latter had failed to treat the timber of the house against beetle borers in the manner required by the regulations and here De Villiers J.P. said (at 1001):

- '1. Where the statute or by-law enacts that a certain thing shall be done for the *benefit of a person* he has, in the absence of any indication in the statute or by-law of an intention to the contrary, a civil remedy for any special damages sustained by him by reason of non-compliance with the terms of the statute or by-law.
2. Where the enactment is for the *benefit of the public*, any one of the public who, in the course of a lawful occupation, is injured in his person or property by a failure to comply with the enactment has, in the absence of any indication to the contrary, a remedy in damages against the person upon whom the statutory duty is cast.
3. Where a statute *does not create a new duty*, but merely provides a remedy for a breach of an existing duty, it would require very clear and express language to justify the conclusion that the Legislature intended to substitute the new remedy, whether it be civil or criminal, for the existing remedy.
4. But where a *new duty is created* and by the same statute which creates such duty a penalty is imposed for breach of the duty, the question arises whether the infliction of the penalty is the only remedy intended by the Legislature, or whether a person who has been damaged by the breach of such duty is entitled to recover damages by civil action.'

See also *post*, pp. 505-8, and *Sand & Co. v. S.A.R.*, 1948 (1) S.A. 230 (W).

In *Hall and another v. Edward Snell & Co., Ltd.*, 1940 N.P.D. 314, it was held that a breach of the duty prescribed by the Foods & Drugs Act, 1929, not to sell impure or defective food was a new duty and that the remedy was by way of criminal prosecution only. But this decision is in conflict

with that in *Young's Provision Stores (Pty.) Ltd. v. Van Ryneveld*, 1936 C.P.D. 87. Where, however, the seller is a retailer and is neither an artificer nor a manufacturer, he would not so be liable (*Kroonstad Westelike Boere Ko-op. Vereeniging v. Botha*, 1964 (3) S.A. 561 (A.D.) at 571). Apart from *culpa*, a person who seeks to interdict another from trading without a licence must show either that the particular legislation which prohibits the illegal trade is one which is made in his special interest or, alternatively, if that is not so, then that he personally has suffered damage which generally members of the public have not suffered (*Macropoulis v. Millinos*, 1966 (1) S.A. 477 (W) at 478-9). For a discussion on the liability of a manufacturer at common law see *post*, p. 17.

On the other hand **regulations** drawn up by a government department for the guidance and **control of its own servants**, even though they are authorized by statute, do not create a 'statutory duty' towards the public in the above sense of the term, e.g. in respect of railway regulations (per Wessels C.J. in *Bardeleben's case*, 1934 A.D. at 481). It has been held that a breach of a statutory duty on the Railways to shut all train doors before it moves off, did not ground an action for negligence by a boy of 8 years who attempted to enter the carriage through an open door after the train had started to move off (*Bellsted v. S.A.R. & H.*, 1936 C.P.D. 399 at 409), but the correctness of this decision is doubtful since it is contrary to the decision in *Brookes v. London Passenger Transport Board* [1947] 1 All E.R. 506 (K.B.), based on similar circumstances and also to the ruling in *Hare v. British Transport Commission* [1956] 1 All E.R. 578 (Q.B.). In the latter case the door of a train was left open, causing plaintiff, who was standing on the station platform, to be injured as the train moved off and she was awarded her damages. It is submitted that the latter decisions are preferable.

A cognate but different question concerns the effect of a statutory provision on the issue of *culpa* at common law. The common form of the problem is this: If there is in existence a statutory provision that vehicles shall not exceed a certain speed, or that the rule of the road shall obtain in a particular form, does a breach of the provision convict the offender of negligence? The general tendency of the courts is to regard the breach of a statutory provision as not necessarily constituting proof of negligence (*R. v. Nathan*, 1938 T.P.D. 170), but as being **prima facie evidence** thereof. In *Rawles v. Barnard*, 1936 C.P.D. at 77, Davis J. said that the statutory regulation 'might be a guide to the court in arriving at a conclusion as to whether or not there had been negligence in any particular case'. A breach of the statutory duty will generally be a cause of action in itself for anyone who could show that he had suffered special damage as a direct result of its breach (*Patz v. Greene & Co.*, 1907 T.S. 427) provided the harm complained of is of the kind which the statute intended to prevent (*Chandler v. Middelburg Municipality*, 1924 T.P.D. 454; *Cato N.O. v. Adm., Transvaal*, 1966 (2) S.A. 129 (T) at 137). In such cases the statutory provision should be specially pleaded. See also (1938) 55 *S.A.L.J.* 409 and *post*, pp. 505-9, in reference to regulations.

A breach of a statutory duty on the part of the plaintiff could, today, give rise to an apportionment of his damages (cf. *Selikman v. London Assurance*, 1959 (1) S.A. 523 (W)).

NEGLIGENCE DEFINED

Negligence (*culpa*, in the sense explained above) may be defined as the **failure to exercise towards another, in given circumstances, that degree of care which the law considers that a reasonable man should exercise in those circumstances.** In this conception there are four principal elements, each one of which requires detailed consideration, namely, (a) that negligence consists in a failure to exercise care; (b) it is the care which the law considers should have been shown towards a particular individual; (c) the care required is that of the reasonable man, and (d) the care required is that which is reasonable in the particular circumstances. (See *Union Govt. v. National Bank of S.A.*, 1921 A.D. 128.)

1. THE DUTY TO EXERCISE CARE

(a) *Anticipating harm*

Care implies foreseeing harm to others. A person must take precautions against his acts causing injury to others if the likelihood of such harm is such as would be realized by a reasonably prudent person. He need not, however, take precautions against the mere possibility of harm not amounting to a likelihood as would be realized by such reasonably prudent person (*Wasserman v. Union Govt.*, 1934 A.D. at 231; *Manderson v. Century Ins. Co.*, 1951 (1) S.A. 533 (A.D.) at 544, and *King v. Phillips* [1953] 1 All E.R. 617 (C.A.); *Cape Town Municipality v. Paine*, 1923 A.D. at 217; *Frocks, Ltd. v. Dent & Goodwin*, 1950 (2) S.A. 717 (C) at 728; *Kakamas Bestuursraad v. Louw*, 1960 (2) S.A. 202 (A.D.) at 231; *Robinson v. Roseman*, 1964 (1) S.A. 710 (T) at 715; see *post*, p. 83). As was said by Innes C.J. in *Farmer v. Robinson G.M. Co.*, 1917 A.D. 522, *culpa* consists in a failure to exercise reasoned foresight, not a failure to predict the future, or, alternatively in *Cooper v. Armstrong*, 1939 O.P.D. 140, the test is not that of an unduly timorous man constantly expecting death. The question therefore is: Would a reasonable man have foreseen harm? The test is whether a reasonable man would—not could—have foreseen harm (*Herschel v. Mrupe*, 1954 (3) S.A. 464 (A.D.) at 475; *Brown v. Hunt*, 1953 (2) S.A. 540 (A.D.) at 544; see also *Levin v. Lockhart-Ross*, 1939 T.P.D. 363). In this case appellant had thrown a lighted match down at the scene of a motor collision causing petrol to be ignited and damaging the car. Held, that the respondent had not discharged the onus of proving that the appellant should have been aware of the presence of escaped petrol on the ground and that he should, therefore, have foreseen the consequences of his conduct.

The essence of negligence, depending as it does, on the care of a diligent man, requires that the plaintiff should establish that (a) the defendant should have foreseen the possibility of his conduct injuring another in his person or property and causing him patrimonial loss and (b) that the defendant failed to take **reasonable steps** to have guarded against such occurrence (*Robinson v. Roseman*, 1964 (1) S.A. 701 (T) at 715). Where, therefore, the defendant had foreseen the danger and had taken certain steps, then the onus is on the plaintiff to show that there were further steps which the defendant could, and should, have taken to avoid potential danger (*Kruger v. Coetzee*, 1966 (2) S.A. 428 (A.D.) at 431).

(b) *Remote possibility of harm*

‘A person need not take precautions against a mere possibility of harm not amounting to such a likelihood as would be realized by the reasonably prudent person’ (per De Villiers J.A. in *Cecil v. Champions, Ltd.*, 1933 O.P.D. at 32, cited and applied in *Moubray v. Syfret*, 1935 A.D. at 209, and in *Wasserman v. Union Govt.*, 1934 A.D. at 228, and *Herschel v. Mrupe* (*supra*)). Compare *Joffe & Co. v. Hoskins and another*, 1941 A.D. at 451 (*post*, p. 29). A vivid imagination might well foresee some possibility of danger in any activity; but the law only requires the possibility to be guarded against if such precaution would appear wise to the reasonably prudent person. Once it is concluded that the reasonably prudent person **would** have foreseen the possibility of harm then the court will hold that the defendant **should**, or ought, to have foreseen that harm (*Herschel v. Mrupe* (*supra*) at 475–6). In *Cecil v. Champions, Ltd.*, the principle was applied to the risk to customers in a shop from a condition not dangerous to those in full possession of their faculties. In *Moubray v. Syfret* it was applied to the practice of allowing a bull to run with the herd in a camp through which passed an unfenced road. In *Wasserman v. Union Govt.* it was applied to the risk of being stung by a bee and dying therefrom. *McLaughlin v. Koenig*, 1928 C.P.D. 102, a case on the failure to provide a fire-escape in an hotel, is probably an application of the same principle. A negligent cyclist cannot be held responsible for damage sustained by a woman in the vicinity who, as a result of shock from the noise of the collision, wrenches and injures her back and later gives birth to a premature stillborn child, since he cannot have contemplated the likelihood of injuring her in the circumstances (*Bourhill v. Young* [1942] 2 All E.R. 396 (H.L.)). While the law does not expect a man to be over careful, it does not permit him to be unduly careless (*Wilson v. Birt (Pty.) Ltd.*, 1963 (2) S.A. 508 (D) at 510). The doctrine of foreseeability in relation to the remoteness of damage, does not require foresight as to the exact nature of the damage: It is sufficient if the person, sought to be held liable, should reasonably have foreseen the **general nature** of the harm that might, as a result of his conduct, befall someone exposed to risk of harm by such conduct (*Kruger v. Van der Merwe*, 1966 (2) S.A. 266 (A.D.) at 272).

The fact that damage had previously been caused in **similar circumstances** can be considered in deciding whether the defendant should not, in the present case, have foreseen harm to the plaintiff or his property (*Administrator, Cape v. Preston*, 1961 (3) S.A. 562 (A.D.)).

(c) *Serious or trivial harm and cost of precautions*

In deliberating whether there is any liability at all on the part of the defendant the court must have regard to the slowness of the chance that the risk will be followed by actual harm, with the probable lack of seriousness of such harm if no steps are taken to guard against it. In this regard the classic dictum of Schreiner J.A. in *Herschel v. Mrupe*, 1954 (3) S.A. 464 (A.D.) at 476–7, has been followed in *Administrator, Natal v. Stanley Motors, Ltd.*, 1960 (1) S.A. 690 (A.D.) at 701–2; *Bowden v. Rudman*, 1964 (4) S.A. 686 (N) at 688, and *Broom and another v. The Administrator, Natal*, 1966 (3) S.A. 505 (D). In *Herschel’s* case Schreiner J.A. said:

'No doubt there are many cases where, once harm is foreseen it must be obvious to the reasonable man that he ought to take appropriate avoiding action. But the circumstances may be such that a reasonable man would foresee the possibility of harm but would nevertheless consider that the *slightness of the chance* that the risk would turn into actual harm, correlated with the probable *lack of seriousness* if it did, would require no precautionary action on his part. Apart from the *cost or difficulty* of taking precautions, which may be a factor to be considered by the reasonable man, there are *two variables*, the *seriousness* of the harm and the *chances* of its happening. If the harm would probably be serious if it happened the reasonable man would guard against it unless the chances of its happening were very slight. If, on the other hand, the harm, if it happened, would probably be trivial, the reasonable man might not guard against it even if the chances of its happening were fair or substantial. An extensive gradation from remote possibility to near certainty and from insignificant inconvenience to deadly harm, can, by way of illustration, be envisaged in relation to uneven patches and excavations in or near ways used by other persons.'

This is in accord with the decision in *Paris v. Stepney B.C.* [1951] 1 All E.R. 42 (H.L.) where Lord Normand, in quoting *Salmond on Torts* (at 49), said that there are two factors in determining the magnitude of the risk—the seriousness of the injury risked, and the likelihood of the injury being in fact caused. Lord Morton added (at 51E) that one 'must take into account both elements, the likelihood of the accident happening and the gravity of the consequences. The more serious the damage which will happen, the more thorough are the precautions which an employer must take.'

(d) *Error of judgment*

In *Lennon v. B.S.A. Company*, 1914 A.D. 1 at 8, Lord De Villiers is reported to have said that:

'Neither error of judgment nor even an unwise decision would necessarily be proof of want of ordinary care amounting to *culpa*, unless accompanied by conduct which is in some degree blameworthy',

and this dictum has been cited with approval in *Pierce v. Hau Mon*, 1944 A.D. 175 at 181, and *R. v. Williams*, 1943 E.D.L. at 233. While the rule was applied in *Lennon's* case to the 'extreme caution' argued to be applicable in the handling of poisons, its consideration is usually considered in cases of **sudden emergency** and applied, with caution, in collision cases only to instances wherein it can be found that such error is excusable if it is one which a reasonably careful and skilful driver might, in the 'agony' of the moment, nevertheless commit. (See *Van Staden v. May*, 1940 W.L.D. 198 at 201; *Thornton v. Fisser and another*, 1928 A.D. 398 at 412; *Kleynhans v. African Guarantee and Indemnity Co., Ltd.*, 1959 (2) S.A. 619 at 624-5, and *R. v. Du Toit*, 1947 (3) S.A. 141 (A.D.).)

The phrase is, however, one which is apt to cause confusion inasmuch as it may mistakenly be taken to postulate a subjective state of mind whereas the test of *culpa* is always an objective one, namely the degree of care which should have been exercised by a *diligens paterfamilias*. Accordingly, where it is a person's duty to exercise proper skill and a correct judgment, in the circumstances, a failure to do so is undoubtedly negligence, but where, on the other hand, such error is 'justifiable' from an objective point of view, then the actor concerned cannot be said to have been guilty of having displayed a lack of proper care (*Steenkamp v. Steyn*,

1944 A.D. 536 at 553; *Stewart v. Bresler*, 1951 (3) S.A. 942 (C) at 951; *Kleynhans v. African Guarantee and Indemnity Co., Ltd.*, 1959 (2) S.A. 619 at 624-5; *S. v. Smit*, 1963 (4) S.A. 824 (G) at 826).

For cases where it has been held that where, in retrospect, it might have been said that the driver might have acted otherwise but was excused for his error in judgment made at a time when he had to act instantly in an emergency, see *R. v. Short*, 1927 C.P.D. 146 at 148; *S.A.R. v. Symington*, 1935 A.D. 37 at 45; *Jojo v. Botha*, 1949 (2) P.H., O. 25 (E), and *Stewart v. Bresler* (*supra*); and see also *post*, p. 314.

(e) *Exceptions to the rule*

The members of a community have a general right not to be injured in person or property. There is, therefore, a corresponding duty on all members so to regulate their activities as not to cause harm to others (*Cape Town Municipality v. Paine*, 1923 A.D. 207 at 216-17; *Perlman v. Zoutendyk*, 1934 C.P.D. 151 at 155).

This general duty is subject to exceptions, for there are certain activities which a man may practise without being required to consider whether their effect will be to injure others; though in our law probably he may not practise them with impunity if he actually *intends* to harm another, e.g. the interception of underground water (*Union Govt. v. Marais*, 1920 A.D. 240 at 246-7). These exceptions may be grouped under the general heading of 'Exercise of Rights' (see for example Pollock, *Torts*, 12th ed., p. 149, cf. McKerron, *Delicts*, p. 15). Their general effect would appear to be that the bona fide use of one's own land for normal agricultural purposes (*Johannesburg Municipality v. African Realty Trust*, 1927 A.D. 163 at 177), and bona fide trade competition (*Matthews v. Young*, 1922 A.D. 492 at 507), are not in themselves ground for liability; nor need a man refrain from them even though he knows that they may, or even must, result in harm to others. The discussion of these exceptions is matter for a work on delicts generally, or on jurisprudence; it need not delay us here; particularly as it would appear that even in the case of acts normally falling within these exceptions, due care must be exercised not to exceed the limit of the exception; so that *culpa* might still be a ground of liability. But unless he can bring himself within some such exception, a man who indulges in any activity which may cause harm to others is under a duty to exercise such care as may be necessary under the circumstances.

(f) *Omission and commission*

The duty, as has already been observed, is primarily not a duty to be active. It is a duty, **if one is active, to regulate that activity by taking due care** (*Du Toit v. Minister of Posts & Telegraphs*, 1936 T.P.D. 248). It may consist of an omission to do something which a prudent and reasonable man would do in the circumstances or in doing something which a prudent and reasonable man would not do in the circumstances. But the duty is one which covers both **immediate** and **prospective** injury. If an act is likely, either immediately or at some future time, to cause injury to others unless due care be taken, the duty to take care arises; and will continue for as long as the risk of injury remains: It will then be an active duty; a duty to take active steps, if they be or become necessary, in order to avoid

injury to others. So that **once activity has been indulged in**, the negative duty not to injure others will be transformed into a positive duty to take active steps to prevent injury to them: or, as it is commonly put, though there is (statute and contract apart) no liability for a pure omission, there may be liability for an omission coupled with a previous act of commission. Per Innes C.J. in *Halliwel v. Johannesburg Municipality*, at 672, cited with approval in *Joffe & Co. v. Hoskins and another*, 1941 A.D. at 452:

‘For the decision of the present dispute it is sufficient to say that where, in consequence of some positive act, a duty is created to do some other act or exercise some special care so as to avoid injury to others, then the person concerned is, under Roman-Dutch law, liable for damage caused to those to whom he owes such duty by an omission to discharge it.’

Where a patch of oil had dripped from a vehicle and the foreman, upon seeing it, had at once told a man to get sawdust and had tried to stop people passing that way, it was held that he had taken all reasonable care to remedy the danger and that the defendant was not liable (*Blackman v. Railway Executive* [1953] 2 All E.R. 323 (C.A.)).

Liability for pure omission, without any previous act, arises only by (a) agreement or (b) statute (see *Du Toit v. Minister of Posts and Telegraphs*, 1936 T.P.D. 248) (motorist, without any negligence, damaging a telegraph line).

Such previous act of commission may be the undertaking of some special relationship such as *guardianship*, *medical attention*, *agency*, etc. It may be, and this is the most frequent type of case, the acting by a *public body* such as a *municipality* under permissive powers, e.g. repair of roads, there being no positive duty by statute for their repair (*Moulang v. Port Elizabeth M.C.*, 1958 (2) S.A. 518 (A.D.) at 531) (see *post*, p. 144). But it may be something less than either of these; as in *S.A. Railways v. Saunders*, 1931 A.D. 276, where a vehicle was left with a third party on the understanding that it would be collected again from the street where a third party would leave it when unloaded, an arrangement which threw upon the Railways the active duty either to collect the vehicle, or to render its presence in the street safe to traffic. In passing it should be noted, however, that the mere lending of a vehicle to a third party, without such an arrangement, would probably *not* entail liability for the act of the third party in leaving the vehicle in a dangerous position. Whenever, therefore, there has been ‘prior conduct’ by a party, which has created a situation from which harm to others may reasonably be expected to result, either immediately or at some future time, unless due care is taken, the duty arises to take active steps to prevent such harm (*Saunders’s case*, citing *Halliwel v. Johannesburg Municipality*, 1912 A.D. 659; *Cape Town Municipality v. Paine*, 1923 A.D. 207, and *Avenue Shipping Co. v. S.A.R.*, 1938 C.P.D. 247 at 264). As indicated (*post*, p. 33), the risk of harm may be such as arises from the acts of *third parties*, if such acts should have been foreseen.

In the absence of such prior activity, however, there is no obligation to be active, and consequently no liability is entailed for harm resulting from inactivity. So in *Van Reenen v. Glenlily V.M. Board*, 1936 C.P.D. 315, where defendant’s servants became aware of a fire on defendant’s property, which might spread and did in fact spread to plaintiff’s, it was held that there was no legal duty on them to extinguish it, in the absence of proof

that it had originated from any act of theirs. Moreover, even the act of defendant in endeavouring to extinguish a fire which had encroached on his property will not ground an action to his neighbour if the fire spreads to his neighbour's lands due to some neglect on the part of the defendant in failing completely to extinguish it (*Van Wyk v. Hermanus Municipality*, 1963 (4) S.A. 285 (C)). The cases of *Cambridge Municipality v. Millard*, 1916 C.P.D. 724, and *Conrad v. Cambridge Municipality*, 1921 E.D.L. 4, in which the defendant municipality was held liable for a fire originating by the act of some third party in a grass-grown street, were, it is respectfully submitted, wrongly decided. (See also Dönges and Van Winsen, *Municipal Law*, p. 473, and *post*, p. 147.)

Further, even though there may have been activity, the duty to take care will arise only when the activity itself is one from which harm may arise if no care is taken. It does not arise from activity per se if the risk of harm is not thereby increased. The common application of this principle is to road repairs by municipalities; the rule being that, unless such activities introduce a 'new danger', there is no liability (see *De Villiers v. Johannesburg Municipality*, 1926 A.D. 401; *post*, p. 146); but the principle is of general application. Accordingly, if in fact a 'new danger' is introduced, there may well be an active duty to anticipate and guard against even the acts of independent third parties (*post*, p. 146).

A clear case for omission is to be found in *Silva's Fishing Corp'n. (Pty.) Ltd. v. Maweza*, 1957 (2) S.A. 256 (A.D.), where, although the defendant had been informed that its fishing-boat was in distress, it failed to take any steps to rescue its crew although effective rescue facilities were available to it. Its prior act in sending out a boat knowing that, if the engine failed, it would drift helplessly until wrecked created an active duty to see that it was safe and, if that were impossible, to use the rescue facilities that were available. Compare *The Oropesa* case [1943] 1 All E.R. 211 (C.A.).

2. CARE TOWARDS ANOTHER

To pass now to the second element in the conception of *culpa*: that the care must be owed to a particular individual. By this is meant, that the plaintiff must show the breach of a duty owed *to himself*; there must be a nexus of duty between himself and the defendant, for 'if I see a child drowning, there is no legal duty upon me to save it', although 'sometimes the law requires me to be my brother's keeper' (*Peri-Urban Areas Health Board v. Munarin*, 1965 (3) S.A. 367 (A.D.) at 373). See *Bingham on Negligence* (2nd ed.), p. 9, quoting Denning L.J. in *Davies v. Cargo Fleet Iron Co. and another* [1956] C.A. 24 where the latter is reported to have said: 'A bystander is not bound to warn another whom he sees walking into danger, but it is a different matter when the danger is of his own making.'

Duty to Oneself: The requirements, relating to a duty to another, obtain only when the functionary is the defendant. Where, however he is the plaintiff, he certainly owes a duty to himself to take a reasonable degree of care not to be injured by his own negligence. This is the whole basis of contributory negligence and of 'fault' in terms of the Apportionment of Damages Act (*Davies v. Swan Motor Co.* [1949] 2 K.B. 291

(C.A.) at 309; *Nance v. British Columbia E. Rly.* [1951] 2 All E.R. 448 (P.C.) and see *post*, p. 64).

(a) *The scope of the duty*

Although there exists the general duty not to harm others by want of due care, it is not enough for a plaintiff to show that he has suffered damage, that such damage would have been avoided if certain precautions had been taken, and to point to the general duty. He must apply that general duty to the particular facts; he must bring himself and his facts within the scope of the duty. He must establish that there was in the particular circumstances of his case a duty to take a precaution; and that the duty was owed to himself, for Roman-Dutch law also, like English law, requires the existence of a duty to take care owed by the defendant to the plaintiff (*Western Alarm System (Pty.) Ltd. v. Coini & Co.*, 1944 C.P.D. 271, and *Herschel v. Mrupe (supra)* at 475).

There is, consequently, no such thing as *culpa in abstracto* (as postulated by Van der Walt in (1964) 81 *S.A.L.J.* 505), for one cannot say that a person is negligent without referring to the foreseeable damaging consequences of his actions (1967) 84 *S.A.L.J.* 79). Thus while an attorney may be liable to his client for his negligence in the course of his professional activities, he is not liable in delict to a third party with whom he has no contractual privity (*Broderick Properties (Pty.) Ltd. v. Rood*, 1964 (2) S.A. 310 (T); *Candler v. Crane Christmas Co.* [1951] 2 K.B. 164 (C.A.). See also (1964) 81 *S.A.L.J.* 294 and (1958) 75 *S.A.L.J.* 213).

The relationship aspect of the parties is illustrated in the case of *S. v. Russel*, 1967 (3) S.A. 739 (N), in regard to fellow workers. Here it was found that A, having been warned of the fact that the electric current was about to be switched on, owed a duty to his fellow workmen to pass the warning on to them and that his failure to do so justified his conviction for culpable homicide (see also *post*, p. 18).

In what circumstances does the plaintiff succeed in showing the existence of such a duty owed to him? In cases where there exists a special relationship, the scope of the duty is clear; it is defined by the terms of the relationship. But where there is no special relationship, what persons fall within the ambit of the duty?

The general answer is clear, though there are difficult problems connected with its application to certain types of case. 'The duty arises whenever the defendant, whose act is complained of, should **reasonably have foreseen the possibility of harm being caused by his act to another person.**' In *Perlman v. Zoutendyk*, 1934 C.P.D. 151 at 158, Watermeyer J. (as he then was) used the word 'probability' of harm but this was obviously done *per incuriam*. This does not, however, mean what is 'remotely possible' but what is 'reasonably possible' (*Munarin v. Peri-Urban Areas Health Board*, 1965 (1) S.A. 545 (W) at 551). Accordingly what is 'remotely possible' does not accord with the concept of liability (*Overseas Tankship, Ltd. v. Morts Dock & Engineering Co., Ltd.* [1961] 1 All E.R. 404 (P.C.) (known as the 'Wagon Mound' case). See also *Wasserman v. Union Govt.*, 1934 A.D. 228; *Cowan v. Ballam*, 1945 A.D. at 95; *Manderson v. Century Insurance Co.*, 1951 (1) S.A. 533 (A.D.) at 544, and *John Williams Motors v. M. of Defence*, 1965 (3) S.A. 725 (O)). A similar analogous test

was applied in *Joffe & Co. v. Hoskins & Bonamour N.O.*, 1941 A.D. 431 at 451, when Centlivres J.A. posed the test of the 'likelihood' of harm, and this test was applied with approval by Watermeyer C.J. in *Stride v. Reddin*, 1944 A.D. 162 at 172. The 'likelihood' of harm is, therefore, to be equated with what is 'reasonable possible' (see *Kruger v. Coetzee*, 1966 (2) S.A. 428 (A.D.) at 429; *Cowan v. Ballam*, 1945 A.D. at 95; *Wasserman v. Union Government*, 1934 A.D. 228 at 231 (bees hiving in roof of house)). In view of these decisions it would not appear that the decision in *Smit v. General Accident Fire & Life Ass. Corpn.*, 1964 (3) S.A. 729 (C), was correctly decided. Here it was held that a person reversing into the line of traffic ought to foresee that the brakes of another vehicle driver might fail, when the latter is taking evading action, since this contingency would appear to be something in the nature of a 'remote possibility'. (See also *Herschel v. Mrupe*, 1954 (3) S.A. 464 (A.D.) at 475, where Greenberg J.A. spoke of the possibility that 'could', not 'would', be foreseen by a reasonable man (see *ante*, p. 9).)

No 'privity' in the contractual sense is required; the fact that reasonable foresight would have included the plaintiff among those who might suffer harm is enough to establish the duty to him. This does not, of course, require knowledge by the defendant of the identity or even of the existence of the plaintiff; it is enough if the plaintiff can bring himself within the class of persons who should have been present to the mind of the defendant as likely to be injured (see *Cowan v. Ballam*, 1945 A.D. 81). See also *Workmen's C.C. v. De Villiers*, 1949 (1) S.A. 474 (C). In this case it was held that mere proof that defendant was negligent in bumping a door with his lorry as he entered a garage did not render him liable in damages at the suit of a plaintiff workman who, unknown to defendant, was working on a ladder placed behind and against such door.

If, therefore, the circumstances are such that a reasonable man would not have anticipated harm to the plaintiff, or to persons in the position or circumstances of the plaintiff, then no duty arises, and no liability is as a consequence incurred (*Union Govt. v. National Bank*, 1921 A.D. 121). In this case, contrary to regulations, a post office stamp was left lying on the counter, which enabled a fraud to be committed; it was held that inasmuch as a reasonable man would not have anticipated the commission of the fraud as a likely consequence of the negligent act complained of, no duty was owed to members of the public who might be damnified by a contingency so remote. Per Innes C.J. (at 129):

'Would a reasonable man have foreseen that a stamp so placed would be likely to be utilized for forging postal orders to the prejudice of those who acquired them? If so, he owed a duty to all such to safeguard the stamp; but, if not, there was no duty and no *culpa*.'

A less certain application of the negative aspect of the principle is *Cape of Good Hope Bank v. Fischer*, 4 S.C. 368, where it was held that though the Registrar of Deeds owes a duty towards mortgagees to exercise care in the registration of bonds, he owes no duty to, and is accordingly not liable for negligence to, cessionaries: a decision which perhaps turns more on the question of proximity of causation. (See also *Levin v. Lockhart*, 1939 T.P.D. 363, and *Broderick Properties (Pvt.) Ltd. v. Rood*, 1964 (2) S.A. 310 (T).)

Clear illustrations of the principle are the cases on the duties of land-owners, and of those in control of structures, to those who come upon their property to their knowledge: cases which are considered and discussed *post*, p. 196, where there is also a dissertation on the difficult question whether, in a case where a clear duty exists towards persons known to be on premises, it is any defence that the plaintiff was a trespasser whose presence as an individual was not and could not reasonably have been known.

The 'Thin Skull' case: What would appear to be anomalous, in regard to the 'reasonable possibility' rule, is the principle that the defendant must 'take the plaintiff as he finds him'. Here the diversity of human attributes should be taken into account and, consequently a blow that would not, normally, injure an ordinary person will attract liability if the plaintiff is suffering from some peculiar disability such as a thin skull (*Delieu v. White & Sons* [1901] 2 K.B. 669; *Smith v. Leech Brain & Co., Ltd.* [1961] 3 All E.R. 1159 (Q.B.) at 1161), or is suffering from a complaint making him prone to cancer (*Wilson v. Birt (Pty.) Ltd.*, 1963 (2) S.A. 508 (D) at 516), or predisposition to coronary thrombosis resulting from a neck injury (*Ocean Accident & Guarantee Corp., Ltd. v. Kock*, 1963 (4) S.A. 147 (A.D.) at 152. Stuart in (1967) 84 *S.A.L.J.* at 86 submits that the thin-skull rule does not apply to criminal law but this argument was not accepted in *R. v. Tichaona John*, 1969 (2) S.A. 560 (R.A.D.) at 571, where it was held if the resultant death (after an intentional assault) is 'within the range or ordinary human experience' the accused would not be exculpated, on a charge of culpable homicide, since 'eggskull skulls, weak hearts and other human ailments are well within the range of human experience', and, applying the objective test, should be reasonably foreseen.

The 'thin skull' cases should not, however, be extended too far for, as was said by Lord Wright in *Bourhill v. Young (supra)*:

'Does the criterion of reasonable foresight extend beyond people of ordinary health or susceptibility, or does it take into account the peculiar susceptibilities or infirmities of those affected which the defendant neither knows nor could reasonably be taken to have foreseen? . . . One who suffers from the terrible tendency to bleed on slight contact . . . cannot complain if he mixes with the crowd and suffers severely, perhaps fatally, from being merely brushed against. There is no wrong done there. A blind or deaf man . . . cannot complain if he is run over by a careful driver who does not know of and could not reasonably be expected to observe and guard against the man's infirmity.'

See also *Board v. Thomas Hedley Co., Ltd.* [1951] 2 All E.R. 431 (C.A.) at 432D (dermatitis—higher degree of sensitivity than usual). See also *post*, p. 81, and Luntz in (1964) 81 *S.A.L.J.* 18–23.

(b) *The personal equation*

In visualizing the possibility of harm to others regard is had to the type of person whose safety may be imperilled and consideration is given to the experience and skill of the type of person normally to be expected on the premises or locality in question. In *In re S.S. Winton: Avenue Shipping Co. v. S.A.R.*, 1938 C.P.D. 247 at 265, Centlivres J., in quoting Phillimore J. in *Norman v. G.W. Rly. Co.* [1915] 1 K.B. 596, said:

'One must take into account what is called in modern parlance the 'personal equation'; what may not be safe for one person may be safe enough for persons who frequent particular business premises. For instance, in loading a ship, a dock gangway consisting of a plank, without a hand-rail may be safely provided, though its narrowness and slope may be such that an ordinary person, not accustomed to ships, may not find it easy to use, because stevedores and seamen who are to use it can use it safely. The gangway has to be safe for the class of persons who use it on business. . . . If it is safe for him it does not matter whether it is safe or not for anybody else.'

See also *Cecil v. Champions, Ltd.*, 1933 O.P.D. 27 at 34-7 (steps on premises safe for a sober customer).

(c) *Manufacturers*

Extremely difficult questions relate to the application of the principle, to **contractual duties**, and particularly to manufacturers. These have become burning questions in English law, consequent upon the decisions of the House of Lords in *M'Alister v. Stevenson* [1932] A.C. 562 (the snail in the ginger-beer case), and of the Privy Council in *Grant v. Australian Knitting Mills* [1936] A.C. 85. In the first of these cases it was held that a manufacturer of liquids intended to be consumed, who puts them up in such a form that they will reach the consumer without intermediate examination or alteration, is liable in tort to the consumer who is injured by a defect in the liquid (in that case a dead snail), even though there is no contractual privity. In the second case, the Privy Council applied the principle to the case of a manufacturer who supplied underwear which contained a dangerous chemical in its fabric. These cases are discussed in an article reprinted in the (1937) *S.A.L.J.* 52, from the *Canadian Bar Review*, in which other decisions to the same effect, both English and American, are considered, and are cited with approval by Van den Heever J.A. in *Herschel v. Mrupe*, 1954 (3) S.A. (A.D.) 464 at 486-7. The American cases seem sound in principle and appear to establish that a manufacturer is liable to a user or consumer who is injured by a defect in the article manufactured, irrespective of the number of intermediate hands through which it may have passed, irrespective also of any failure by an intermediate party to detect the defect, provided, of course, the negligence in the manufacturer can be established (*Transfield v. B.I. Cables* [1937] 4 All E.R. 382 (K.B.)), the only limitation to the rule being a possible application of the doctrine of remoteness of causation (see *Grant's* case [1936] A.C. at 107).

This doctrine is in strict accordance with the general principles of our law (*Kroonstad Westelike Boere Ko-op. Vereeniging v. Botha*, 1964 (3) S.A. 561 (A.D.)). Here it was held that the law irrebuttably attaches liability, for a defect in his goods, to an artificer or a manufacturer thereof, and also to a merchant seller who 'professes to have the skill and expert knowledge' in relation to the goods sold but that the ordinary merchant selling goods is not liable for consequential damages in respect of a latent defect of which he is unaware. Here it was held that the decisions in *Lockie v. Wightman & Co., Ltd.*, 1950 (1) S.A. 361 (S.R.), and *Young's Provision Stores (Pty.) Ltd. v. Van Ryneveld*, 1936 C.P.D. 87, cannot be regarded as reflecting the law in South Africa. The exclusion of liability in respect of a merchant 'dealing exclusively' with a type of imported goods

has elicited comment by Jean Davids in (1964) 81 *S.A.L.J.* 419 and, it seems, that the position should be remedied by the legislature in regard to goods imported from overseas, having regard to the difficulty of suing them personally in the same way as is provided by section 14(2) of the Sale of Goods Act in England.

In *Kubach v. Hollands, Frederick Allen, Ltd., Intervening*, 53 T.L.R. 1024, Lord Hewart refused to apply the doctrine to a case where the manufacturer did not know that the article (a chemical) was to be retailed to a customer for use in an **experiment** which rendered the defect dangerous, and where the manufacturer gave an express warning to the retailer that the article should be tested before use, a warning which was not passed on to the customer.

(d) *Particular relationships*

It has been observed (*ante*, p. 14) that, even where there has been no prior act of commission, the relationship between an overseer and his fellow workmen may create a strict obligation to pass on to them the warning he has received of the dangerous conditions under which they are working (*S. v. Russel*, 1967 (3) S.A. 739 (N)). This general principle is, however usually limited to cases where the parties *stand to one another in a relationship which itself defines their duties towards one another*. Thus where there exists, between two parties, a contract which creates and defines their respective duties, one party cannot **enlarge** the duty incumbent on the other by reference to the general duty to exercise care. And the same will usually be true of relationships other than contractual, notably the relationship between *neighbouring owners of immovable property*. This would appear to be the principle underlying the case of *United Building Society v. Lennon, Ltd.*, 1934 A.D. 149. In that case a building, while being demolished, collapsed and damaged a neighbouring building, leased by the plaintiff company, by removing from it the support which had in fact been afforded it. There was no allegation or proof of any legal right to such support. The Court intimated that if the demolition had been carried out without notice to the owner of the building, a right of action would have accrued; because to remove support previously enjoyed (though not legally claimable) without due warning would undoubtedly be a negligent act. It was ruled, however, that where the owner of the building knew of the fact of demolition, there was no duty to take care not to remove support in the absence of proof that a legal right to such support existed. In general, it would appear that some caution may be required in applying the principle, that the anticipation of harm to others creates the duty to exercise care, to immovable property, since the rights and duties in respect of which are frequently prescribed by special rules of law. In England, for example, it has been held that *M'Alister v. Stevenson* does not apply to immovables (*Otto v. Bolton & Norris* [1936] 1 All E.R. 960 (K.B.).

(e) *Negligent statements*

Liability for false statements has been clouded by the generally accepted notion that, in contract, an innocent misrepresentation cannot give rise to an action for damages but only for rescission of the contract, although

considerable doubt has been thrown on this principle by Hunt in (1964) 81 *S.A.L.J.* 241 at 244–5 which submissions find confirmation by the authors of Wille & Millin (16th ed.) at p. 75 who find a *media via* between fraud, on the one hand, and innocent misrepresentation on the other hand by inserting an intermediary situation between the two in respect of ‘Negligent Misrepresentation’ which may, in appropriate circumstances attract liability for damages in delict.

In the past the courts of this country have not been unanimous in regard to the liability of a person issuing a false statement of fact negligently when damage has been suffered by the person relying thereon. Thus in *Dickinson v. Levy*, 11 S.C. 33, De Villiers C.J. held that, ‘independent of contract, a false representation causing damage is not actionable unless it is fraudulent’, and this ruling was followed in *De Kock v. Gafney*, 1914 C.P.D. 377 at 382, that ‘moral fraud must be proved’. On the other hand, in *Perlman v. Zoutendyk*, 1934 C.P.D. 151, it was ruled that a sworn appraiser, who had issued a certificate to one P of the valuation of certain land well knowing that such certificate would be used in inducing other persons to lend money on the security of that land, with the result that plaintiff was deceived by such negligent statement and suffered a loss of £1,450 in making advances on the supposed security on the insolvency of the owner and the worthlessness of the security, should be held liable for his negligent statement. Here Watermeyer J. (as he then was) held, following the principle of Roman-Dutch law of the care required of a *diligens paterfamilias*, the defendant ought to have foreseen the likelihood of damage being suffered by prospective mortgagees and that the principles of English law, as set out in *Nocton v. Ashburton* [1914] A.C. 932 and *Derry v. Peak*, 14 A.C. 337, only govern actions for deceit and do not shut out actions based on negligent misrepresentation (at 156). Furthermore he considered (at 157) that it is here that Roman-Dutch law parts company with English law inasmuch as the former permits of ‘a larger latitude of inquiry’ and ‘is preferable to the more rigid limits of the English rules’ (which are circumscribed by considerations as to whether the plaintiff is a trespasser, or an invitee or a licensee). Again in *Western Alarm System (Pty.) Ltd. v. Coini*, 1944 C.P.D. 271, authority is to be found for the proposition that a statement made negligently and directly to another, with knowledge or notice, that another person will act upon it, will attract liability if that statement proves to be false and the informee suffers damage thereby.

On the other hand, it was ruled in *Alliance Building Society v. Deretitch*, 1941 T.P.D. 203, that, independent of contract, a false representation causing damage is not actionable unless it is fraudulent, since there is no duty not to be negligent towards another (at 211). In this case the appellant had negligently given notice to the owner’s (respondent’s) tenants to vacate their premises and it was held that the *actio legis Aquiliae* was confined to damage to corporeal property. A similar decision was reached in *Van Zyl v. African Theatres*, 1941 C.P.D. 61, where the defendant had advertised in a local newspaper that the plaintiff would be singing at certain entertainments to be given by it. In this case the plaintiff did not plead negligence but actually averred malice and it was ruled that no damage had been proved, and that it was not sufficient that the statement

be made negligently since *animus injuriandi* must be present. About this time the situation was analysed critically by McKerron in (1930) 47 *S.A.L.J.* 359 at 368–9, and cf. *Hasseltine v. Wedderpohl*, 1947 P.H., F. 72 (C).

The matter then came up for decision in *Herschel v. Mrupe*, 1954 (3) S.A. 464 (A.D.), the facts of which were that the attorneys of plaintiff, whose husband had been killed in a motor vehicle collision, had inquired of defendant's attorneys as to the identity of his insurance company and had been given the name of a particular company, which statement was false and made negligently. As a consequence plaintiff suffered damages in incurring wasted costs in instituting action against the wrong company. On appeal, the majority of judges decided that she was not entitled to succeed. Here Centlivres C.J., dissenting, held that the case of *Perlman v. Zoutendyk* (*supra*) had been correctly decided in so far as negligent statements being made by professional men holding themselves out as being proficient in their professions (such as sworn appraisers, actuaries, accountants and surveyors) (at 472) and that the defendant should have been held liable for the plaintiff's loss. The other four judges, in giving different grounds therefor, held that the plaintiff was not entitled to succeed, Van den Heever J.A. because no right of hers had been invaded, Schreiner J.A. because plaintiff's damages had not been foreseeable, Fagan J.A. because the defendant had not been guilty of culpable negligence and Hoexter J.A. because of the 'triviality of the foreseeable damage'. This decision was criticized by McKerron in (1954) 71 *S.A.L.J.* 316 and also by Mulligan (*ibid.*) at p. 323 who states that 'From the diversity of the *rationes decidendi* it is impossible to extract any authoritative answer to the harassing question'.

In the meantime the matter came up for decision in the English courts in *Candler v. Crane, Christmas & Co.* [1951] 1 All E.R. 426 (C.A.) where a company's auditors had been instructed to prepare the company's accounts and a balance sheet. They knew that these were required for the purpose of inducing the plaintiff to invest money in the company and it was held that, although the defendants had certified the accounts as true, and notwithstanding the fact that the plaintiff had, as a consequence, invested £2,000 for shares in the company which thereafter went into liquidation, the negligent statements of their auditors did not entitle the plaintiff to succeed, by reason of the fact that there was no contractual or fiduciary relationship between the parties, and because the defendant owed no duty to plaintiff in preparing the accounts. Here the logical reasoning of Denning L.J., in dissenting to the judgment, is persuasive, for he posed the question: 'To whom do these professional men owe a duty?' and answered the query by saying that the duty was owed, not only to their clients but also to those people to whom they knew their clients would show such accounts (at 434) although not, perhaps to strangers—as was the case in *La Lievre v. Gould* [1893] 1 Q.B. 491, where a surveyor had handed his certificates to a building owner. He accordingly followed the decision in *Cann v. Wilson* (1888) 39 Ch.D. 39 where a valuator had been grossly careless in making a valuation for the very purpose of enabling his client to raise a mortgage on the property concerned and had presented this to the mortgagee's solicitor, with the result that the mortgagee lost his money. Here it had been held that, apart from any contract at all, he

was liable in negligence. Denning L.J. also relied on the decision in *De Freville v. Dill*, 96 *L.J.K.B.* 1056, which was to the effect that a doctor who negligently certified a man to be a lunatic when he was not, is liable to him, although there is no contract in the matter, because the doctor knows that the purpose of the certificate is to decide whether a man is to be detained or not.

The reasoning of Denning L.J. is cited by reason of the fact that, when the aforementioned cases came up for review in *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.* [1963] 2 All E.R. 575 (H.L.), the law lords went out of their way to approve of his dissenting judgment and held that a negligent misrepresentation causing financial loss can give a good cause of action even in the absence of any contractual or fiduciary relationship. Here certain bankers had been requested to give a statement on the financial position of a particular firm, but had protected themselves by saying, in their reply, that their opinion was given 'without responsibility on the part of the bank or its officials'. (See also (1963) 80 *S.A.L.J.* 483.)

It is submitted, therefore, that the opinion of McKerron in (1963) 80 *S.A.L.J.* 483 is correct and should be followed in future, namely, that society would be reasonably protected if liability for negligent statements were limited to cases where such information is given (a) to the plaintiff himself or (b) to a person whom the defendant knows is acting as the plaintiff's agent or (c) to a person whom the defendant has been expressly or impliedly authorized to communicate it to the plaintiff.

While every case must perforce be determined by its own particular circumstances, it is submitted that, provided the following prerequisites of liability enunciated by Schreiner J.A. in *Herschel v. Mrupe* (*supra*) at 480 (in following *International Products Co. v. Erie Company*, 56 A.L.R. 1377 at 1381) are observed, namely that: 'Liability in such cases arises only when there is a duty, if one speaks at all, to give correct information and that this involves many considerations' which may be postulated as follows:

- (a) There must be knowledge, or its equivalent, that the information is desired for a serious purpose.
- (b) That he, to whom it is given, intends to rely and act upon it.
- (c) That, if false or erroneous, the informee will, because of it, be injured in person or property.
- (d) That the relationship between the parties must be such that in morals and good conscience, the one has the right to rely upon the other for information and the other giving the information owes a duty to give it with care.

See also Hunt in (1964) 81 *S.A.L.J.* 241 and in (1968) 85 *S.A.L.J.* 379.

The aforementioned considerations were cited with approval in *Currie Motors (Pretoria) (Pty.) Ltd. v. Motor Insurance Co., Ltd.*, 1961 (3) S.A. 872 (T) at 876. Here the plaintiff, an interested party in the purchase of a motor-car, had inquired of the defendant whether an insurance policy, in respect of the car in question, was still in operation and had received an affirmative reply. In fact the policy had already lapsed a year earlier and it was held that plaintiff had a good ground of action for damages resulting from the said negligent and erroneous statement. (See Addendum, *post*, p. 37.)

3. THE CARE OF A REASONABLE MAN

(a) *Diligens paterfamilias*

It has been observed that where a man should reasonably anticipate the risk of harm to others, he is under a duty to exercise due care. In determining what is reasonable anticipation and what is due care, the law applies the same test, namely, the judgment of the *diligens paterfamilias* (*Kruger v. Coetzee*, 1966 (2) S.A. 428 (A.D.) at 431; *In re S.S. Winton*, 1938 C.P.D. 247 at 264–5). If the *diligens paterfamilias* would have foreseen the risk, the duty to take care arose; and the degree of care required is the care which the *diligens paterfamilias* would have exercised in the same circumstances (*Cooper v. Armstrong*, 1939 O.P.D. 140; *Cape Town Municipality v. Paine*, 1923 A.D. 207 at 217, and *Fred Saber (Pty.) Ltd. v. Franks*, 1949 (1) S.A. 388 (A.D.) at 405; see *ante*, p. 8). In other words the standard of carefulness required by law of a driver is that of a diligent *paterfamilias*, not a nervous one (*S.A.N.T.A.M. v. Moolman*, 1952 P.H., O. 16 (A.D.)).

The common translation, or equivalent, of this Latin phrase is ‘the ordinary reasonable man’. The equivalent is on the whole satisfactory; though it is as well, in using it, to bear in mind that the original stresses the requirement of *diligence*. There are really two elements in the conception. The first is, that the degree of care required is not that of the ‘ordinary or average man’ in the usual, slightly derogatory sense of those words; it is the care ‘which would be observed by a careful and prudent man, the father of a family and of substance, who would have to pay in case he fails in his duty. The standard of conduct is a high one. The test is not the diligence of the supine man, but of the man who is alive to probable dangers and takes the necessary steps to guard against them’ (per De Villiers J.A. in *Transvaal Administrator v. Coley*, 1925 A.D. at 28–9; see also *R. v. Williams*, 1943 E.D.L. 228). The other element is, that it is not the highest possible diligence which is required; but only such diligence as, according to the ordinary standards of life, may reasonably be demanded of one in the position of the defendant for the reasonable *paterfamilias* is *not an insurer* and ‘is not given to anxious conjecture and morbid speculation’ (*S.A.R. & H. v. Reed*, 1965 (3) S.A. 439 (A.D.) at 443 and, as said by Lord Macmillan in *Glasgow Corporation v. Muir* [1943] 2 All E.R. 44 (H.L.) at 48, ‘The reasonable man is presumed to be free both from over-apprehension and over-confidence’. As was said by Innes C.J. in *Mitchell v. Dixon*, 1914 A.D. 519 at 525, a medical practitioner ‘is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care’; words which, though spoken in relation to professional skill, are equally applicable to non-professional care. Compare *S.A.R. v. Symington*, 1935 A.D. 37, per Wessels C.J. at 43: ‘such diligence as an average reasonable man would use in the circumstances’, and *Mandelbaum v. Bekker*, 1927 C.P.D. 375, per Watermeyer J. at 377: ‘the ordinary man of average knowledge’; phrases which, in their context, are not opposed to the dictum of De Villiers J.A., already cited. In the last resort, the diligence of the *diligens paterfamilias* is the diligence which the court, guided by precedent, thinks could fairly be expected in the circumstances.

In arriving at its decision, the court will, in cases where professional or trade practices are involved, take into account what is the usual and recognized practice (*Colman v. Dunbar*, 1933 A.D. 141 at 157 (building trade practice); *Van Wyk v. Lewis*, 1924 A.D. 438 at 444 (surgical practice)).

Degrees of negligence or fault

In contract, distinctions are drawn, not always very clearly, between the standard of care to be required in different kinds of contractual relationship (*culpa lata*, *culpa levis*). In delict, however, there are no such distinctions; *in lege Aquilia et levissima culpa venit*; there is only one standard, that of the *bonus paterfamilias*. The precautions which, by that test, should have been observed in a particular case depend, of course, upon the circumstances of that case since, the inquiry is today directed to the extent of the deviation from the norm of a *diligens paterfamilias* for apportionment purposes when a more analytical examination of the facts is called for. Accordingly, in determining the 'degree of fault' (under the Apportionment of Damages Act), it may be found that there was only slight negligence (*culpa levissima*) on the part of the plaintiff when he would then be awarded a higher proportion of his damages than he would be entitled to if his conduct amounted, in substance, to *culpa levis* (ordinary negligence) and may even forfeit his claim for *culpa lata* (gross negligence, or recklessness). In every case, however, the test applied by the court is an objective one, since it is not concerned with the subjective mind of the party concerned, even if he be a child. (See *Jones v. S.A.N.T.A.M., Bpk.*, 1965 (2) S.A. 542 (A.D.) at 556; *Neuhaus N.O. v. Bastion Insurance Co., Ltd.*, 1968 (1) S.A. 398 (A.D.) at 407, and *South British Insurance Co. v. Smit*, 1962 (3) S.A. 826 (A.D.).) See, however, Boberg's submissions in 1968 (85) *S.A.L.J.* 127-31.

In the sphere of criminal law the same objective test, as equated to the caution required of a *bonus paterfamilias*, is applied when plain negligence is alleged (*R. v. Meiring*, 1927 A.D. 41), but, in this regard, it should be noted that the various legislatures have decreed that different maximum sentences are applicable according to whether the charge, upon which the accused has been convicted, is one of driving without due care and attention, or without reasonable consideration for other road-users (*culpa levissima*) or negligently (i.e. *culpa levis*) or recklessly (*culpa lata*)—for the meaning and concept of which see *post*, p. 289.

(b) Skill, knowledge, and capacity

Whenever a man engages voluntarily in an operation requiring skill, knowledge, capacity or strength, for its proper performance, he is required to manifest a reasonable degree of such skill, knowledge, or capacity. *Imperitia, infirmitas, ignorantia, culpa adnumerantur* (cf. *S. v. Mahlalela*, 1966 (1) S.A. 226 (A.D.)). This is not an exception to the general principle; it is merely an application of it; for the prudent man will not voluntarily undertake a task for which he has not the requisite knowledge, skill or capacity. Thus a person who undertakes the skilful trade of bleaching hair and who, without testing one or two hairs of the customer, or warning the customer, proceeds with the treatment, causing the customer's hair

to fall off, can be castigated as having done the work in a negligent and unskilful manner (*Dobbin v. Waldorf Toilet Saloons, Ltd.* [1937] 1 All E.R. 331). The commonest application of the rule in modern life is in motoring (*R. v. Van Dyl*, 1939 E.D.L. 203—see *post*, p. 292), but it applies to all skilled tasks. The skill, knowledge or capacity required will be that which, having regard to the general level of skill in the profession or class who practise the operation, may reasonably be expected (*Mitchell v. Dixon*, 1914 A.D. 519; *Van Wyk v. Lewis*, 1924 A.D. 438). In England it has been ruled that a jeweller who pierces a lady's ears for ear-rings is not bound to take the same precautions as a surgeon would take (*Phillips v. William Whiteley, Ltd.* [1938] 1 All E.R. 566 (K.B.)), but this must be an exceptional case. If, however, the task is undertaken in the stress of an emergency, in the absence of someone properly skilled, the rule will not apply. (See also *post*, p. 133.)

(c) *Dangerous occupations or pursuits*

Where a person is engaged in an intrinsically dangerous occupation or pursuit a higher standard of diligence is required of him than of one engaged in a less dangerous pursuit (*Durban C.C. v. S.A. Board Mills, Ltd.*, 1961 (3) S.A. 397 (A.D.) at 405; *Wilson v. Birt (Pty.) Ltd.*, 1963 (2) S.A. 508 (D) at 511) (dismantling scaffolding). Consequently an activity which is per se inherently dangerous, such as the berthing of a tanker full of petrol or oil, requires a very high degree of care, and allowances for errors of judgment and mistakes on the part of one's servants should be foreseen and provided for (*Shell Tankers, Ltd. v. S.A.R. & H.*, 1967 (2) S.A. 666 (E) at 676–7).

(d) *Disability*

What is the position of persons suffering from some disability? The matter may be considered from two points of view: first, with respect to the liability of such a person to others; and second, with regard to his ability to recover damages from others.

Liability. It is clear that a prudent man suffering from a disability which disables him from safely engaging in some activity, whether skilled or not, will not engage in it (except, of course, in case of necessity); and if he does so and damage results to others, directly caused by the infirmity, he cannot plead it as an excuse. The classical example of this is contained in *Institutes* 4.3.8, where the rule was applied to a rider or driver who, whether from want of strength or from want of skill, cannot hold in his horse and thereby injures another. Whether a particular disability does so affect ability to engage in an activity (e.g. deafness in connection with driving a motor vehicle on a public road) is, of course, a matter for the court to decide.

Right to recover damages. The question here is less simple. We must distinguish between disabilities which are *obvious and visible* to others, and those which are not so visible. A man suffering from a defect readily visible to others, e.g. lameness, may reasonably expect others to exercise special care towards him; so that what would not be negligence towards others might, in appropriate circumstances, be negligence towards him. And conversely, what would be contributory negligence in others might

not be such in him. Even here, however, there may be activities so dangerous to a disabled man that he should not indulge in them at all, or if he does should adopt special precautions. But where the disability is not one readily apparent to others, they cannot be expected to make allowances for it unless they know of it; in such cases the disabled person should either forgo the activity, or take special and sufficient precautions. (See per Pittman J. in *Blumrick v. East London Municipality*, 1934 E.D.L. 24 at 40, and cf. *Cecil v. Champions, Ltd.*, 1933 O.P.D. 27 at 32; Beven, 4th ed., vol. I, p. 178, and per Lord Sumner in *Glasgow Corporation v. Taylor* [1922] 1 A.C. at 67.)

(e) Children

A typical disability readily apparent to others is that consequent on tender years. While skilled activities should not be indulged in by children, the law does not take up the attitude that the ordinary activities of daily life, such as crossing the road, travelling in vehicles, etc., are operations which should not be indulged in. It recognizes, however, that children cannot be expected to show that degree of care in their own protection which might be expected of an adult (*Lentzner v. Friedman*, 1919 O.P.D. 27; *Gardner v. Grace*, 1 F. & F. 359). The results are twofold. In the first place, conduct which might be contributory negligence in an adult may well not be such in a child. And in the second place, specially stringent duties of care are thrown on those who carry on activities, or are in control of structures or property, where children are known or should be known to be present. Any person who allows a young child to stray on to a busy street should anticipate, not only that the child might be injured, but also that other users of the road might be injured in endeavouring to avoid the child (*Lewis v. Carmarthenshire C.C.* [1953] 1 All E.R. 1025). See also *ibid.* [1953] 2 All E.R. 1403 (C.A.) and [1955] 1 All E.R. 565 (H.L.). In the final court of appeal it was held that the negligence on the part of the defendant rested not on the teacher but on the local education authority.

Negligence of child

In running down cases (see *post*, p. 421) the courts have, hitherto, showed a marked reluctance to hold that young children of 'tender years' have been negligent (see *Adams v. Sunshine Bakeries*, 1939 C.P.D. 72; *R. v. Sweidan*, 1939 E.D.L. 32; *Clairwood Motor Transport Co., Ltd. v. Akal & Sons*, 1959 (1) S.A. 183 (N)) the onus being upon the person alleging it to prove that the child was able to visualize the situation and apprehend the danger (*ibid.*). See also (1960) 77 S.A.L.J. 410 and *Bower v. Hearn*, 1938 N.P.D. 399. Whether the conduct of a child is to be regarded as negligent, so as to deprive him of some or all of his damages, is in each case a matter of inquiry. The court must 'regard the situation of the child, his age and intelligence; and negligence means a disregard of the care which might reasonably be expected of such a person in the situation of the one whose actions are being considered' (per Greenberg J. in *Makan v. Southern Coal Co.*, 1927 W.L.D. 167, summarizing the effect of the judgment in *Lentzner v. Friedman*, 1919 O.P.D. 20; cf. *Feinberg v. Zwarenstein*, 1932 W.L.D. 73, and *Bellstedt v. S.A.R.*, 1936 C.P.D. at 409, and *Phipps v. Rochester Corporation* [1955] 1 All E.R. 129 (Q.B.)). If a child

under puberty is old enough to have, and does have, the intelligence to appreciate a particular danger and has knowledge of how to avoid it or to take precautions against it and, further, that he is sufficiently matured to be able to control irrational or impulsive acts (such as a sudden and unsuspected dash into a busy main road) then such child can be made to bear its share of the damages resulting from its negligence in relation to the collision in question (*Jones N.O. v. S.A.N.T.A.M., Bpk.*, 1965 (2) S.A. 542 (A.D.)). It follows that there is no absolute rule regarding age over 7 years, but since a child of under 7 years is *doli incapax*, he cannot be capable of contributory negligence (*De Bruyn v. Minister van Vervoer*, 1960 (3) S.A. 820 (O), and *Van Oudtshorn v. Northern Assurance Co., Ltd.*, 1963 (2) S.A. 642 (A.D.)). If, however, a child is over 7 years of age his acts can be stigmatized as negligent unless the circumstances show that he is not sufficiently mature to be able to control his acts (*Neuhaus N.O. v. Bastion Insurance Co.*, 1967 (4) S.A. 275 (W)). Thus it has been held that children of the ages of 10 and 11 years respectively can be guilty of a 'fault' in terms of the Apportionment of Damages Act (*South British Ins. Co. v. Smit*, 1962 (3) S.A. 720 (C)). See also *Nieuwenhuizen N.O. v. Union National Ins. Co.*, 1962 (1) S.A. 760 (T), *Neuhaus's case (supra)* (10 years), and *Perry v. Thomas Wrigley, Ltd.* [1955] 3 All E.R. 243 (child of 8 years).

Identification with guardian? Where a child, who is too young to go about safely by himself, is under the charge of a parent or guardian and that adult is guilty of negligence which directly contributes to the injury of the child, is the child so 'identified' with the adult as to be deprived of his remedy? This very difficult question cannot be answered with certainty. In *Waite v. N.E. Railway, E.B. & E.* 719, a child of five was in the charge of its grandmother. The grandmother took a ticket for the child. While crossing the line in order to take a train, both were killed in circumstances in which the proximate cause of their deaths was the negligence of the grandmother together with that of the railway servants. It was held that the child was 'identified' with the negligence of the grandmother. But this was before 'The Bernina' case (*Mills v. Armstrong*, 13 A.C. 1), which routed the doctrine of 'identification' between driver and passenger. *Waite's* case was treated as distinguishable, but it was said by Lord Bramwell that on principle, if *Mills v. Armstrong* was right, *Waite's* case must be wrong, which seems correct. In *Oliver v. Birmingham Co.* [1933] 1 K.B. 35, *Waite's* case was treated as overruled. In this case, a young child crossing a public street was injured by the combined negligence of its guardian and the defendant's servants; the Court, on appeal from a county court, held that there was no 'identification', and that the child was entitled to damages. If *Waite's* case still has any validity, it would appear that it must be in the realm of contract; which, in fact, seems to have been the ground on which Cockburn C.J. decided it. (See also *post*, pp. 421-4.)

In *O'Callaghan v. Chaplin*, 1927 A.D. 310 at 332, the Appellate Division expressly applied the principle of *Waite's* case. The question at issue was whether a child, who was bitten by a dog on the private property of the defendant, could recover damages from him. The child had been brought on to the property in the charge of a nurse; it was through her fault that he was bitten; the Court held that 'the permission to enter was subject to the condition that the attendant exercised due and proper care of the child'.

It was the contractual (or semi-contractual) aspect of *Waite's* case which was relied on. The case is no authority for the proposition that, whenever and wherever a young child is in the care of an adult, it is 'identified' with the negligence of that adult. It would appear therefore that, unless there has been something in the nature of a contract between the child, acting no doubt through its guardian, and the defendant, which can be regarded as incorporating an implied condition of the kind set out, there is no legal ground for imputing to the child the negligence of an adult in whose charge the child is. (Compare the general discussion of 'identification' in the chapter on General Defences, *post*, p. 75.) The circumstances in which such a condition can be implied must, however, be very rare.

Nevertheless, the fact that children too young to look after themselves will in the normal course be in the care of an adult is an element to be taken into account in deciding what care should be exercised towards such children (*Cakata and another v. Provincial Insurance Co., Ltd.*, 1963 (2) S.A. 607 (D)). Here it was ruled that the special vigilance and care, required of a motorist when approaching children, is reduced or even excused when they are in charge of an adult if it reasonably appears to him that the adult can, and will, exercise effective control over the child. Much, of course, depends on the circumstances of each particular case (see also *R. v. Hansen*, 1946 (2) P.H., O. 26 (C)).

Special care towards children. In places where the presence of children should be expected, a specially stringent duty of care is owed towards them. The cases fall into two groups: (a) running-down cases, and (b) cases relating to land, structures, and children in or on vehicles.

The **running-down** cases (see *post*, p. 421) do not go so far as to establish the rule that since children may be expected to be present in public places and roads, the driver of a vehicle must at all times expect, and be prepared to avoid, the consequences of irrational conduct by such children. But they do establish that where there is any special reason to think that children may suddenly appear in the road, e.g. when they have been seen on or near the road, or reasonably anticipated that they might intrude on to the carriageway (as in *Soper v. Watney*, 1934 C.P.D. 203) a driver must exercise the special care which such a circumstance may reasonably be held to call for. In other words, if children are **actually seen** in the road, or should reasonably be anticipated to be entering the road, special care must be taken to avoid a foolish move on their part (*Borean N.O. v. Shield Insurance Co., Ltd.*, 1967 (3) S.A. 701 (C)). It follows that where a child could not be seen, nor his presence be reasonably anticipated, a conviction based on negligence will be set aside. (See *S. v. Nene*, 1967 (1) P.H., H. 5 (N) (child of 9 years), and *S. v. Phillips*, 1967 (1) P.H., O. 24 (T) (child of 6 years).) There seems here to be no trace of the doctrine that, as the dangers of a public road are 'familiar and obvious' (see the *Glasgow Corporation* case below), third parties are entitled to rely on children being under adult protection.

In regard to the presence of children on **land, structures or vehicles**, however, the doctrine is recognized that it is an element in the care which the owners of such property are required to show, that children, too young to care for themselves, will normally be under adult protection. In *Glasgow Corporation v. Taylor* [1922] 1 A.C. at 60-1, Lord Shaw of Dunfermline

said that a municipality maintaining a public park 'is entitled to take into account the fact that reasonable parents will not permit their children to be sent into the midst of familiar and obvious dangers except under protection or guardianship'; and that in respect of such 'familiar and obvious dangers', there is no special obligation of protection. (See also *Skinner v. Johannesburg Turf Club*, 1907 T.S. 852.) This dictum was *obiter*, the danger in that case (a poisonous shrub) not being obvious; and the case was one in which the parent sued in his own right and not on behalf of the child; but the principle would appear to be of general application. In *Johannesburg Municipality v. Venter*, 1936 T.P.D. 287, it was applied in an action by a parent on behalf of the child, it being held that as the risk of a child getting into a dangerous position on a tram is a familiar and obvious one, no special duty of care arises in respect of it. Similarly in *O'Donovan v. S.A.R. & H.*, 1938 P.H., J. 24 (E), it was held that the telescopic, or movable, bar in the gangway between railway coaches was a familiar or obvious danger.

But in respect of dangers which are not 'familiar and obvious', there is a special duty in respect of children. Such dangers are often referred to as '**traps or allurements**', and it is recognized that what would not constitute an 'allurement' to an adult may well constitute such to a child (*Morley v. Staffordshire C.C.* [1939] 4 All E.R. 92 (C.A.); *Dyer v. Ilfracombe Urban D.C.* [1956] 1 All E.R. 581 (C.A.)). Wherever therefore there exists, either in a place to which the public have access, or on private property to which it is known, or should be known, that children resort, something which a reasonable man would realize would constitute an 'allurement' which might lead the children into danger, a special duty exists to guard them against such danger. See *Cutness v. Scaffolding (G.B.) and others* [1953] 1 All E.R. 165. The case of *Transvaal Administrator v. Coley*, 1925 A.D. 24, is an example of such a case, the allurement there consisting of a mound in a children's playground coupled with the concealed danger of stakes in long grass. In *Bellstedt v. S.A.R.*, 1936 C.P.D. 399, it was sought to apply the principle to an open door on a moving train, but without success. The English cases of *Lynch v. Nurdin* (1841) 1 Q.B. 29 (cart left unattended); *Harold v. Watney* [1898] 2 Q.B. 320 (defective fence lining road) and *Bates v. Stone Parish Council* [1954] 3 All E.R. 38 (C.A.) (defective chute in playground), show the application of the rule to public places.

In the case of young children the duty of the occupier is not confined to concealed dangers. The test appears to be whether a reasonably prudent person would have foreseen that the particular defect or condition of the premises to which the accident is attributed, would have been likely to cause it. It would place an undue burden on the occupier of the premises to require him to safeguard young boys from every form of injury consequent upon their indulging in boyish pranks (*Badenhorst v. Pienaar*, 1955 (1) P.H., J. 11 (T)).

The question of liability if the child is a *trespasser* raises difficulties, which are discussed in the chapter on Occupation of Land and Buildings (*post*, p. 199). It is enough to say here that if the presence of children could not reasonably have been expected there can be no special duty owed to them.

(f) *School-teachers and nurses—Infants*

A person *in loco parentis* should exhibit special care in respect of very young children and anticipate that they may stray on to busy streets where they can become a source of danger both to themselves and to other persons using the road who might become injured in endeavouring to avoid the child (*Lewis v. Carmarthenshire C.C.* [1953] 1 All E.R. at 1027 and [1955] 3 All E.R. 565 (H.L.)).

(g) *Schoolchildren playing games*

The mere fact that a game or exercise, which is a necessary incident of desirable education for youths, have some risk of injury does not induce the conclusion that there is negligence on the part of the school authority to permit boys to take part in such game (*Broom and another v. Administrator, Natal*, 1966 (3) S.A. 505 (D.)). In this case the boys were playing baseball with a cricket stump which slipped out of the hand of one player and injured another. Held, that the probable lack of seriousness of harm, and the small chance of its happening, were such that the use of a stump could not be castigated as negligence. The same reasoning would apply to other games such as rugby, soccer and hockey. (See also *post*, p. 34.)

4. THE CARE REQUIRED TO BE REASONABLE IN THE CIRCUMSTANCES

There is no such thing as abstract negligence. Negligence is the failure to show due care *in the circumstances*; 'the existence of *culpa* depends entirely on the circumstances of the particular case' (per Wessels C.J. in *S.A.R. v. Symington*, 1935 A.D. 202, and *Moubray v. Syfret*, 1935 A.D. 199 at 202). This fourth condition, or prerequisite to liability for negligence is one which is not infrequently overlooked, for not only must the plaintiff show that the possibility of harm should have been foreseen but also that there were, in fact, reasonable steps which the defendant should have taken in order to avoid the harm (*Kruger v. Coetzee*, 1966 (2) S.A. 428 (A.D.) at 431). This should be established either by calling witnesses for the plaintiff or by cross-examination of the defendant or his witnesses (*ibid.* at 432). No one decision on the pure question of negligence, therefore, can be anything but a guide to the decision of a subsequent case; every decision must depend on its own facts. Any discussion of negligence to be of value must keep close to the facts; and the only satisfactory method is to take one by one the various activities in common practice in a community and discuss the duties which fall upon those engaged in these activities. Such is the method adopted in the subsequent chapters of this book. Nevertheless, there are certain general considerations which may usefully be discussed in a general chapter.

(a) *Dangerous things*

A circumstance which will always impose a particularly stringent duty of care is the fact that a dangerous thing is being dealt with. Some things are spoken of as being dangerous *per se*, by which is meant apparently that the slightest interference with them may cause harm; and in respect of them a special duty is recognized, at any rate in England, to guard against such interference by third parties. The category of such things 'dangerous *per se*' is somewhat uncertain (see *per Lord Sumner* in *Weld-*

Blundell v. Stephens [1920] A.C. at 985); but in our law, which avoids rigid categories and prefers 'the flexibility of the Aquilian system' (to use the phrase of Innes C.J. in *Cape Town Municipality v. Paine*), it is probably enough to say that a man dealing with a thing having obviously dangerous possibilities must exercise special care. The same may be said of *dangerous occupations* (see *ante*, p. 24). Here may be noted the special rule by which, even in respect of activities handed over to an 'independent contractor', a continuing duty exists in respect of the taking of precautions (see *post*, pp. 123 and 235).

(b) *Skilled occupations*

It has already been observed that in respect of operations requiring skill, knowledge, or capacity, there is a duty to show such special qualification (*ante*, p. 24).

(c) *Effect of knowledge*

An element in the question of negligence is frequently whether the defendant knew, or should have known, of facts which would create a danger. If he indeed had special knowledge, that fact will throw upon him the duty of acting in the light of such knowledge (*S.A.R. & H. v. Reed*, 1965 (3) S.A. 439 (A.D.) at 440). On the other hand if he *should have known*—that is, if a reasonable man situated as he was would have known—of the said facts, then he is in the same position as if he had actual knowledge.

The fact that there had been **previous complaints** or previous accidents or injuries is very relevant in determining the question of the knowledge on the part of the defendant of the existence of a danger (*Board v. Thomas Hedley* [1951] 2 All E.R. 431 (C.A.); *Kilgollan v. W. Cooke & Co., Ltd.* [1956] 2 All E.R. 294 (C.A.)). On the other hand the absence of accidents or complaints is also very relevant although by no means conclusive (*Michaels v. Brown & Eagle* [1955] 2 Lloyd's Rep. 433).

(d) *Sudden emergency*

A circumstance which is frequently of the utmost importance in deciding upon the question of negligence (and this whether it is negligence proper, or contributory negligence which is under consideration) is whether the party concerned was faced with a 'sudden emergency'. That is to say, if he was suddenly presented with a situation in which he had to act without time for reflection, in circumstances such that whatever he might do might result in harm to himself or others, then he is not to be judged as though he had had time for reflection (*Stolzenberg v. Lurie*, 1959 (2) S.A. 67 (W) at 74; *Beswick v. Crews*, 1965 (2) S.A. 690 (A.D.)). This matter is fully discussed *post*, pp. 314–15.

Warning of Danger

Where there is a danger, or potential danger, to others arising from the activity of a person, or his possession of property, there will often arise a duty towards other persons, likely to be exposed to that actual or potential danger, to warn them of their peril. Such duty can arise in a variety of ways such as (a) the obligation arising from common employment when

one employee would be under a duty to pass on to his other co-employees information of the fact that an electric current will be turned on (*S. v. Russell*, 1967 (3) S.A. 739 (N)), or (b) the duty of the occupier to warn other persons possibly coming on to his premises of the dangers present therein or thereon (e.g. defective stairways, lifts, holes, traps, spring guns (cf. *Ex parte Minister of Justice: in re S. v. Van Wyk*, 1967 (1) S.A. 488 (A.D.)), or bathing-pools (see p. 206), ferocious dogs (*Veiera v. Van Rensburg*, 1953 (3) S.A. 647 (T) at 654), roads under repair (*Durban Corporation v. Milne*, 1939 N.P.D. at 493; *Minister of Justice v. Johannesburg C.C.*, 1954 (1) S.A. 80 (A.D.)), or (c) the duty of a motorist to hoot (see *post*, pp. 433–42), or (d) containers containing poisons, or (e) to warn a patient of the consequences of a proposed operation or of his symptoms (see *post*, p. 134). It is essential that the warning should be *clear and explicit* (*Russel v. Criterion Films (Productions), Ltd.* [1936] 3 All E.R. 627 (K.B.) at 633; *Wilkinson v. Rea, Ltd.* [1941] 2 All E.R. 50 (C.A.); *Smith v. Austin Lifts, Ltd.* [1959] 1 All E.R. 81 (H.L.) at 83D; *Farrow v. Turner*, 1962 C.A. 429).

If, however, there is no duty, i.e. no legal nexus between the parties, then no obligation to warn another of his danger would arise (*Davies v. Cargo Fleet Iron Co.* [1956] C.A. 24, reported in *Bingham on Negligence* (sec. 100)).

THIRD PARTIES

1. NEGLIGENCE OF

A difficult branch of the problem of negligence consists in the inquiry, when is a man bound to anticipate and to guard against the negligence of another, so that failure to do so constitutes negligence in himself? This problem presents two aspects. In the first place, in collision cases, how far is the driver of a vehicle entitled to rely on the due observance of the proper rules of driving by the drivers of other vehicles? In the second place, how far is a man required to guard against negligent interference by third parties in a situation created by himself which, but for such interference, would not be dangerous? (See *Joffe & Co. v. Hoskins and another*, 1941 A.D. 431 at 451.) In considering the general concept of reasonable foresight as the criterion of negligence, it is to be borne in mind that, where the cases speak of 'foreseeing the likelihood of harm', such expression embraces not only a *probable* likelihood but also a *possible* likelihood of harm to another which is of such a character that a reasonable man would take precautions against its occurrence (*Stride v. Reddin*, 1944 A.D. 162 at 172; *Manderson v. Century Insurance Co., Ltd.*, 1951 (1) S.A. 533 (A.D.)). Thus to leave an unattended child in circumstances wherein it might leave school premises and go on to a busy street, is negligence (*Lewis v. Carmarthenshire C.C.* [1953] 1 All E.R. 1025 and [1955] 1 All E.R. 565 (H.L.)).

As examples of such lack of foresight of interference, see *Wells v. Metropolitan Water Board* [1937] 4 All E.R. 639 (K.B.) (leaving a valve box, without a locking device, in a road where it could quite easily be opened by someone, probably a child, causing plaintiff to fall into it) and *Coates v. Rawtenstall Br. Cl.* [1937] 3 All E.R. 602 (C.A.) (leaving an unsecured chain on a children's chute). On the other hand see *Simonds v. Winslade* [1938] 3 All E.R. 774 (C.A.), *Canter v. Gardner & Co., Ltd.*

[1940] 1 All E.R. 325 (K.B.) (hole cover subsequently removed) and *Perry v. Kendricks Transport, Ltd.* [1956] 1 All E.R. 154 (C.A.) (vehicle parked on open ground, explosion caused by child throwing a lighted match into the petrol tank, no liability).

Such foresight of the possible negligence of a third party causing harm, as a consequence of one's own lack of care, was underlined in *Kruger v. Van der Merwe and another*, 1966 (2) S.A. 266 (A.D.), wherein it was held that foreseeability, in relation to remoteness of damage, does not require foresight as to the exact nature and extent of the damage but to the general nature of the harm that might befall some person exposed to risk of harm by such conduct. In this case it was held that the second defendant should have realized and have foreseen, when he overtook another car travelling in the same direction as he in the face of the plaintiff who was proceeding in the opposite direction, that the plaintiff might slow down and turn off the road and, in so doing, cause a car travelling behind the plaintiff to crash into the latter's car. See also *Parity Insurance Co., Ltd. v. Van den Bergh*, 1966 (4) S.A. 463 (A.D.).

2. ANTICIPATING FOOLISHNESS OF

Where two vehicles are in sight of one another, there can be no doubt that the driver of one is entitled, prima facie and up to a point, to rely on the exercise of due care by the other. If that other is on the correct side, he may assume that he will remain there; if he is on his wrong side, he may assume that he will take due steps to return to his proper side (*Solomon v. Mussett & Bright*, 1926 A.D. at 433; cf. *Van Staden v. Stocks*, 1936 A.D. 18; *Thurman v. Eales*, 1925 E.D.L. 36; *Swart v. Albertyn*, 1935 C.P.D. 71). Similarly, he is entitled, prima facie, to assume at an intersection that the other driver will obey a 'stop sign' (*Ulrich v. Pepler & Co.*, 1935 C.P.D. 46) and will recognize his right of way if he has entered first (*Viljoen v. Meiring*, 1936 C.P.D. 168), and will in some respects, act reasonably (*Thornton v. Fisser*, 1928 A.D. 398 at 410). On the other hand 'so soon as it would be evident to a reasonable man that there is danger of an accident arising from the . . . neglect of the wrongdoer to give way' (*Solomon v. Mussett & Bright*) or otherwise to exercise proper care (*Thornton v. Fisser*), he must then take due steps to avoid the results of such improper conduct. In an intersection, for example, having seen another car approaching, the driver is not entitled to take his eyes off that other car, on the assumption that the driver will respect his right of way, even where such right exists; he must recognize the possibility of negligent conduct on the part of the other driver, and hold himself ready to avoid its consequences, although his neglect in this respect will not *ipso facto* disentitle him to damages (*Van der Westhuizen v. S.A. Liberal Insurance Co.*, 1949 (3) S.A. 160 (C) at 173). At what precise stage of the events a reasonable man would realize that the other driver will neglect to exercise due care is, of course, a question of fact in each case. See also *R. v. Welsh*, 1941 E.D.L. 200; *Roos v. Fisher*, 1939 O.P.D. 122; *R. v. Ross-Barrance*, 1942 C.P.D. 85 at 90, and *Wolfaardt v. Martindale*, 1940 A.D. 244, where Tindall J. said:

' . . . the driver is entitled to regulate the manner of his driving on the assumption that another driver will not suddenly and without warning and recklessly, expose himself and others to danger.'

This point of view should be compared with the decision in *Robinson v. Henderson*, 1928 A.D. 139 (see *post*, p. 457), *Van der Merwe v. Union Govt.*, 1936 T.P.D. 185, and *Thornton v. Fisser*, 1928 A.D. 398 at 410, where it was said that 'if every driver of a motor-car were a reasonable man there would be few accidents. It is against the careless and reckless driver that one has to be on one's guard', and also, 'there is no general rule that a person is entitled to act on the assumption that every driver of a motor-car will always act reasonably and diligently. A reasonable man will always base his conduct on the knowledge that drivers of motor-cars are not infrequently guilty of certain classes of negligence of breaches of the law' (*Van den Bergh v. Parity Insurance Co. and another*, 1966 (2) S.A. 621 (W) at 625 (unaffected by the appeal), and *Singh v. New India Ass. Co., Ltd.*, 1966 (4) S.A. 154 (N) at 158-9).

Between these apparently conflicting sentiments it is, however, possible to postulate the following rule: **A driver may regulate his conduct on the general assumption of correct behaviour by others but that, recognizing the possibility of incorrect behaviour, he will so far as is reasonably possible allow a margin of safety for, and pay due regard to, that possibility particularly when approaching danger spots such as intersections.** This postulate was approved of in *Woods v. Administrator, Transvaal*, 1960 (1) S.A. 311 (T) at 314, and see also Wynne J. in *R. v. Venter*, 1959 (2) S.A. 520 (E) at 527, also *S. v. Mkwana*, 1967 (2) S.A. 593 (N) at 597. He should therefore at all times be alert for any sign that another driver is in fact not behaving correctly. See also *Cooper v. Armstrong*, 1939 O.P.D. 140, and *Moore v. Minister of Posts & Telegraphs*, 1949 (1) S.A. 815 (A.D.) at 825.

Much must perforce depend on the particular circumstances, for instance, the driver of a fire-engine is entitled to make a much higher assumption as to the carefulness of other road users to keep out of his way if his siren or bells are functioning (*Johannesburg C.C. v. Public Utility Transport Corp., Ltd.*, 1963 (3) S.A. 157 (W) at 160). But see *S. v. Phillips*, 1968 (2) S.A. 209 (C); and *post*, p. 326.

3. NEGLIGENT INTERFERENCE BY OTHERS

It not infrequently happens that a man creates a situation which is safe in itself, but which may become dangerous if there occurs the interference of third parties over whom he has no control (cf. *Union Government v. Matthee N.O.*, 1917 A.D. 688 at 699). How far is he required to anticipate and guard against the results of such interference? The rule appears to be that if such interference would have been anticipated by a reasonable man, not merely as a remote possibility but as a likelihood to be guarded against, the duty to guard against it arises (*S. v. Stavast*, 1964 (3) S.A. 617 (T)). It is obvious that it is in connection with dangerous things, i.e. things which will become harmful if only slightly interfered with, that the duty will most frequently arise (cf. *Durban Corporation v. Bond*, 1938 N.P.D. 349), such as leaving fire-arms and cartridges lying about (*Wessels v. Ten Oever*, 1938 T.P.D. 26; *R. v. De Bruyn*, 1953 (4) S.A. 206 (S.W.) at 215). In *Berlin V.M. Board v. Richter*, 1929 E.D.L. 59, the principle was applied to poisonous liquid in a dipping-tank; in *Foster v. Moss & Dell*, 1927 E.D.L. 208, to a gate wired back out of the road, the Court holding that in view of the statutory duty to close gates, interference by third

persons should have been anticipated. In *Colman v. Dunbar*, 1933 A.D. 141, however, where props supporting the shuttering of a concrete veranda under construction were apparently interfered with during the week-end, the Court held that as the structure was safe when left and interference to render it dangerous must have been violent or wanton, there was no duty to adopt the (on the evidence) wholly unusual course of having it continually under supervision.

Two English cases on leaving **vehicles unattended** in the street are instructive. In one (*Ruoff v. Long & Co.* [1916] 1 K.B. 248), a lorry was left unattended in a public road. Four separate operations were required to set it in motion. An adult did set it in motion, and it injured the plaintiff. Held, that the person in control of the lorry had not been negligent. In the other (*Martin v. Stanborough* (1924) 40 T.L.R. 557, 41 T.L.R. 1), a car with defective brakes was left on a slope with a block of wood in front of the wheel. Children removed the block and it was decided that there was evidence of negligence to go to the jury. To leave a horse-drawn vehicle unattended in a street, unless securely fastened, would in most cases be negligence; and the fact that the horse is excited by mischievous children is no defence if the presence of children should have been foreseen (*Lynch v. Nurdin* (1841) 1 Q.B. 86).

The duty is **a continuing one**, and persists as long as the situation exists. *Clark v. Chambers* (the *chevaux de frise* case) is an example of such continuing duty (see this case explained in *Weld-Blundell v. Stephens* [1920] A.C. 956 at 989); so are *Burrows v. Marsh Gas Co.*, 7 Ex. 96, and *Dominion Natural Gas Co. v. Collins* [1909] A.C. 640. An interesting recent example is *North-Western Utilities, Ltd. v. London Guarantee & Assurance Co.* [1936] A.C. 108, in which it was held that a company which runs gas-mains under public streets is under a continuing duty to see that the mains are not injured and so rendered dangerous by the acts of the municipality in installing sewers, etc., whether or not such acts are done without proper care. (See *post*, p. 202.)

4. SUPERVISION OF CHILDREN

Where a boy of 12 years was taking part in gymnastic exercises and was injured because another more experienced boy failed to remain at the receiving end of the buck which they were vaulting, it was held that there was no negligence on the part of the teacher in exercising reasonable care and supervision over the children (*Wright v. Cheshire C.C.* [1952] 2 All E.R. 789 (C.A.)). Children in a motor vehicle should be properly supervised, for it is neglectful for the driver thereof to travel with a child standing on the seat of a car next to him (*S. v. Stavast*, 1964 (3) S.A. 617 (T)). Again, a person who undertakes to transport a busload of very young children to and from school should provide a door, or gate, to the bus to prevent young children from alighting therefrom while the bus is still in motion (*Eggeling and another v. Law Union & Rock Ins. Co.*, 1958 (3) S.A. 592 (D), distinguishing *Johannesburg C.C. v. Venter*, 1936 T.P.D. 287). On the other hand it has been ruled that the driver of an omnibus (the door of which is usually kept open except in inclement weather) cannot be held responsible for the injuries suffered by a boy of 14 years in falling out of the bus due either to a sudden and swift movement on the boy's

part or to his having been accidentally pushed by another passenger or some deliberate or heedless conduct on the part of the boy (*S.A.N.T.A.M. Insurance Co., Ltd. v. Leal and another N.O.*, 1968 (4) S.A. 645 (A.D.)) (see also *ante*, p. 27). A parent who entrusts his son of 13 years with an air-rifle should exercise proper supervision over him to prevent his firing it in a street or alley-way to the danger of other users thereof (*Donaldson v. McNiven* [1952] 2 All E.R. 691 (C.A.)).

A schoolmaster is not, however negligent in leaving schoolboys to play in the school grounds without supervision when they jump on to a lorry, delivering coke on the playground, and cause the tipping part to tip up, thereby injuring another child (*Rawsthorne v. Ottley and others* [1937] 3 All E.R. 902). (See *ante*, p. 29.)

5. THE RESCUER

It not infrequently happens that, where one person is exposed to imminent peril or danger through the negligence of another, a third person hastens to his rescue and also sustains injury as a result of his humane efforts. What *vinculum juris* is thereby established between the rescuer and the party whose negligence endangered the first person threatened or injured? There appear to be no South African authorities on the subject. It is submitted, however, that our law is wide enough, and fair enough, to find a place for its application in suitable cases, basing a decision on the test of foreseeability both as to the consequent damage or injury and as to the class of persons likely to be injured. English law was once inclined to limit the application of 'rescue' to instances where the rescuer had acted instinctively (*Brandon v. Osborne, Garrett & Co.* [1924] 1 K.B. 548), it being assumed that where a rescuer courageously undertakes a risk to save a stranger from grievous harm, his remedy would be excluded by the '*volenti non fit injuria*' rule (see *Cutler v. United Dairies* [1933] 2 K.B. 297). This assumption was, however, examined but discarded in *Haynes v. Harwood* [1935] 1 K.B. 146. Where, therefore, a father acted instinctively in running across a road to rescue his 3½-year-old child and was injured, it was decided that he was entitled to damages (*Morgan v. Aylen* [1942] 1 All E.R. 489 (K.B.)).

The matter is discussed in two articles in (1946) 63 *S.A.L.J.* at 6 and 430, where the American decisions are reviewed and from which the following principles may be adduced.

Duty of

As pointed out above (*ante*, p. 12), delictual liability is dependent on acts of commission, not omission, consequently the law has not recognized the moral obligation of common decency to assist another human being who is in danger, this being a matter of conscience.

Duty to

Where, however, a person imperils himself, in order to rescue another who is in danger of being injured through the negligence of a third party, he may recover damages from the negligent party for injuries received while effecting such rescue if such intervention is one which ought to have been reasonably foreseen by the latter (*Wagner v. International Rly. Co.*;

and *Morgan v. Aylen* [1942] 1 All E.R. 489 K.B.)). See also *Hyett v. G.W.R.* [1947] 2 All E.R. 264, [1948] 1 K.B. 345 (C.A.) and *Baker and another v. T. E. Hopkins & Son, Ltd.* [1959] 3 All E.R. 225 (C.A.).

The danger threatened must be imminent and real and not merely speculative or imaginary. In considering the circumstances, however, allowance must be made for the alarm, excitement, confusion and the promptness required, and uncertainty as to the means to be employed, liability to err in the exercise of judgment, and also the seriousness or imminence of the danger. In this regard, a Pennsylvanian court said:

'A rescuer . . . ought not to hear from the law a condemnation of his bravery, because he rushed into danger to snatch from it the life of another; but he should rather listen to words of approval, unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence.'

Negligence of person rescued

Where the defendant is negligent as to the person rescued and the person rescued is contributorily negligent the better view seems to be that the rescuer still has a right of recourse against the defendant and that the antecedent negligence of the person rescued should not be imputed to the rescuer (*Bond v. Baltimore & O. R.R.*). The defendant might, however, have the right to have the delivered person cited as joint defendant.

Sole negligence of person rescued

A difficult position arises in regard to cases where the defendant negligently creates a circumstance necessitating his own rescue. In order to make him liable it would seem that it is essential that he should have owed a duty to the person injured. Such duty might arise from a special relationship existing between the parties. In *Sayor v. Persons*, the plaintiff was injured when he went to the rescue of another, who was in imminent danger of being overwhelmed by a wall about to collapse upon him, and which the defendant was undermining on his own property. Held, that the claim failed since the defendant cannot be legally guilty of neglecting himself. The Court pointed out, however, that it could not be said that the defendant, in placing himself in danger, should have anticipated that someone would, on discovering his danger, have undertaken to shield him from harm.

Negligence of rescuer

A person who voluntarily endeavours to stop a bolting horse has only himself to blame in assuming the risk of stopping it, but the position would be different where a parent, upon seeing that his child is endangered by it, dashes out to save his child and is injured in his endeavours (*Cutler v. United Dairies (London) Ltd.* [1933] K.B. 297) (but see *post*, p. 60).

In this regard all the rules relating to contributory negligence would apply. The test recently was 'Who had the last chance to avoid the harm and who was the proximate cause of the injury sustained?' but now Act 34 of 1956 applies (see *post*, p. 66).

Cases

Defendant negligently drove across an intersection and collided with another vehicle with the result that the defendant's car overturned and defendant and his passenger were pinned underneath. Plaintiff, after rescuing the passenger, was injured in effecting

defendant's rescue, when it righted itself and rolled backwards on to him. Held, the plaintiff was entitled to damages. (*Brugh v. Biglow*.)

The deceased, while in the employ of the defendant, went to the rescue of the latter's foreman who had been overcome with 'black damp' in the defendant's coal-mine. Held, the claim of his dependants failed since there had been no negligence on the part of the defendant. (*Taylor Coal v. Porter's Adm.*)

Defendant's servant negligently left a smoking stove in front of plaintiff's residence in proximity to where a child was playing. The child's clothing caught fire and she ran into the house where her mother put out the fire with her hands, sustaining permanent injuries. Held, she was entitled to damages. (*Lashley v. Dawson*.)

A motorist ran into a power company's electric pole carrying high-tension wires, causing such wires to sag across the highway. On being notified some of the company's linesmen visited the scene, observed the surroundings and also saw that a large crowd was collecting, but did nothing and went away with the intention of returning later, leaving the premises unguarded. In the interim deceased, observing the plight of the motorist, who had run into the pole, went to his assistance, came into contact with a live wire, and was killed. Held, his dependants were entitled to recover damages. (*Arnold v. Northern States Power Co.*)

Where the plaintiff was escorting a child of three and a half years and had, on finding that the child was crossing by itself and was being approached by a cyclist at a speed of over 20 m.p.h., rushed into the road to rescue and was struck by the cycle and injured, the Court held that she was not guilty of contributory negligence and was entitled to damages. (*Morgan v. Aylen* [1942] 1 All E.R. 489.)

ADDENDUM

Negligent Statements

In *Murray v. McLean N.O.*, 1970 (1) S.A. 133 (S.R.), it was held that no action in delict, for damages for negligent misrepresentation, lies at the suit of a prospective seller who, in the course of negotiations with the representatives of a prospective seller, incurred expense or forwent doing other business in anticipation that the negotiations would successfully culminate in a contract of sale, and acting on the faith of a negligent though bona fide representation that the prospective purchaser had set aside the necessary funds for the purchase. This was a case where the government servants had led the plaintiff to believe that certain houses would be required and that the necessary funds were available for the purchase thereof and the latter on the faith of such representations, incurred wasted expenses in his preparation for the implementation of a contract yet to be finalized and concluded.

CHAPTER II

PERSONAL LAW

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MINORS

(a) LIABILITY FOR CULPA

Minority in itself is no defence to an action under the *lex Aquilia* (Dig. 4.4.9.2), but, as has been observed (*ante*, p. 25), tender age is an element which will be taken into account in deciding whether there has been negligence; for what would constitute negligence in an adult will not necessarily do so in the case of a child.

In criminal law there is an absolute presumption that children under the age of 7 years are incapable of *mens rea*. This absolute presumption has its counterpart in civil law, the rule being that children under the age of 7 years are not liable for damage caused by their wrongful acts (Voet 9.2.29; Dig. 9.2.5.2), while with older children it is a matter for the decision of the court whether the exercise of care could reasonably be

expected from them (Pothier, *Oblig.*, sec. 118; Groenewegen's note to Grot. 3.32.19), and whether in the circumstances of the case there has been a failure to show the care which a child of that age should reasonably have exercised (and see *Bellstedt v. S.A.R.*, 1936 C.P.D. 409).

Where, however, a minor engages in an operation requiring skill, knowledge or capacity, he will be required to show a reasonable degree of such skill (*imperita culpa adnumeratur*), since if he is too young to show the necessary skill he must not engage in the operation.

(b) PRACTICE

As matter of practice, a minor has no *locus standi* to sue or be sued. Suit should be instituted by, or directed against, the guardian, natural or appointed, in his capacity as such. Where the minor has no guardian, the court will appoint one (*Ex parte Greeve*, 24 S.C. 202). As to costs against a guardian *de bonis propriis*, see *Bellstedt v. S.A.R.*, 1936 C.P.D. at 412, approving and following *Ex parte Bloemfontein Municipality*, 1934 O.P.D. 11.

It is possible, however, where the minor has reached years of discretion, for him to sue or be sued in his own name, assisted by his guardian (see *Sharp v. Dales*, 1935 N.P.D. 392). Whether in such case costs can be awarded against the guardian *de bonis propriis* is matter of doubt. In *Sharp's* case, Feetham J.P. held that this could not be done, following and applying *Buck v. Green*, 1932 N.P.D. 425; the latter case, however, was disapproved of in *Harms v. Malherbe*, 1935 C.P.D. 167, in terms which make it unlikely that the Cape courts would approve of *Sharp's* case either. The general practice now is for the minor to sue or be sued 'duly assisted by his guardian' (*Tiruvengdam v. Naidoo and another*, 1948 (2) S.A. 746 (N); *Davids v. Pullen and others*, 1958 (2) S.A. 405 (C)).

(c) PARENTS' LIABILITY FOR

A species of vicarious responsibility is imposed by section 357 of Act 56 of 1955 upon the parent or guardian of a child who 'conduces' the commission of a crime or offence. In such cases the parent or guardian can be ordered by the court to pay compensation to the injured party. This section contemplates a failure, through mere negligence or indifference, to prevent a child's lapse into criminal behaviour (Gardiner and Lansdown, 6th ed., p. 77).

The liability of a parent for the acts of his minor child arose crisply in the case of *Wessels v. Ten Oever*, 1938 T.P.D. 26, where it was ruled that the parent who had left a shot-gun in a garage, which was usually locked, together with cartridges on a shelf, which could be reached by a child only if it stood on a bench underneath the shelf, was not liable in negligence for injuries sustained by the child of another person after defendant's son had obtained the gun and the cartridges and fired into the ground in front of the child. This case is to be distinguished from that where the parent actually gives his son a gun to play with after being warned by a neighbour that the manner in which the son used the gun was a source of danger (*Bebee v. Sales*, 32 T.L.R. 413), or where the father fails to exercise reasonable supervision over his child in the use of a gun (*Donaldson v. McNiven* [1952] (2) All E.R. 691 (C.A.)). In this regard it

should be noted that it is a criminal offence for a person to permit a child under the age of 14 years to be in possession of a fire-arm except under the immediate supervision of a European adult. There is also a presumption, where a child is found in possession of a fire-arm, that the father or custodian of such child, or the owner of the fire-arm, permitted or enabled the child to be in possession thereof unless he proves that he could not prevent such possession (section 29 of Act 28 of 1937).

PERSONS OF UNSOUND MIND

Persons destitute of reason are incapable of *culpa*, and damage done by them through failure to exercise care gives no right of action against them (Dig. 9.2.5.2; Grot. 3.32.19; Pothier, *Oblig.*, sec. 118), though it may against those responsible for their custody if they have been at fault. Whether in respect of a particular act the person was or was not capable of the exercise of care will no doubt in delict, as in contract, be a question of fact (*Pheasant v. Warne*, 1922 A.D. 481. See, also, *Lange v. Lange*, 1945 A.D. 332, and *De Villiers and another v. Espach and another*, 1958 (3) S.A. 91 (T)).

HUSBAND AND WIFE—LIABILITY

One spouse is not, as such, liable for the delicts of the other (Cod. 9.47.32). If married out of community, the property of each is separately liable for his or her own delicts. Whether the joint estate of spouses, married in community of property, can be made liable for the delict of one of them has been the subject of a number of conflicting decisions. In the following authorities it has been held that the innocent spouse cannot be so prejudiced, in his or her portion of the joint estate, for the delicts of the other spouse: *Hayes v. McNally*, 1910 T.P.D. 326 at 330; *Levy v. Flemming*, 1931 T.P.D. at 66-7; *Boezaart and Potgieter v. Wenke*, 1931 T.P.D. 70 at 87; Lee in (1935) 52 *S.A.L.J.* 263, and *Lock v. Keers*, 1945 T.P.D. 113 at 115 and 117. The contrary view was, however, taken in *Erikson Motors (Welkom) Ltd. v. Scholtz*, 1960 (4) S.A. 791 (O), when Kloppe J. held, following Prof. Yeats in 1945 *Tydskrif* and after an examination of the Roman-Dutch authorities, that the joint estate of spouses married in community of property, is liable in full for the independent and uninstigated delicts of the wife. This decision was criticized by Prof. Hahlo in (1961) 78 *S.A.L.J.*, who points out the inequity of penalizing an innocent spouse for the personal frolic or peccadilloes of the other, i.e. where a wife has embezzled moneys or where the husband commits adultery with another woman. He also points out the anomaly of such a course having regard to the fact that a wife's claim for damages due to negligence of a third party cannot be met by a plea of the joint negligence of her husband. Prof. Hahlo repeats and amplifies his views in *Husband and Wife* (2nd ed.) at pp. 22-7, which contentions are reasonable and persuasive. In *Opperman v. Opperman*, 1962 (3) S.A. 40 (N), however, Caney J., with two other judges concurring, after a re-examination of the Roman-Dutch authorities, came to the conclusion that a plaintiff is entitled to demand satisfaction from the joint estate of the spouses and that, furthermore, the innocent spouse is not entitled to protect his interest in the joint estate by an application of *boedelscheiding*. In *Rohloff v. Ocean*

Accident & Guarantee Company, 1960 (2) S.A. 291 (A.D.), the Court, while holding that a spouse married by antenuptial contract is not liable for his or her spouse's delicts, left the matter open as regards spouses married in community of property. It is apparent, therefore, that, until an Appellate Court decision is given in this matter, or altered by statute, the decisions in *Opperman's* and *Scholtz's* cases must be accepted as stating the present position of our law. (For action by a wife for her own personal damages see *post*, p. 76.)

If married in community of property, one spouse cannot maintain an action against the other which sounds in damages, since any damages would be payable out of the joint estate (*Mann v. Mann*, 1918 C.P.D. 89; *Tomlin v. London & Lancashire Insurance Co., Ltd.*, 1962 (2) S.A. 30 (D) at 37)). But if married out of community, it is clear that an action based upon the *lex Aquilia* will lie (Voet 9.2.12, cited in *Mann's* case at 98; *Rohloff v. Ocean Accident & Guarantee Corp.*, 1960 (2) S.A. 291 (A.D.)). See (1960) 77 S.A.L.J. 260 and (1962) 79 S.A.L.J. 249); *secus* possibly of an action for assault or other *injuria*. Even when married in community, the marital power may, for certain purposes, be in abeyance, e.g. to enable the wife to sequestrate her husband (*Comerma v. Comerma*, 1938 T.P.D. 220), or to claim her own property, inherited under a testator's will excluding it from community of property (*Erasmus v. Erasmus*, 1942 A.D. 157 at 161 and 162). While a wife, married in community of property, is entitled to sue for her own personal damages she cannot, either under the common law or under the Motor Vehicle Insurance Act, No. 27 of 1953, sue in her own name for the recovery of medical and hospital expenses incurred for the treatment of personal injuries sustained by her in a collision, since her husband is the person liable therefor (*Schnellen v. Rondalia Assurance Corporation of S.A., Ltd.*, 1969 (1) S.A. 31 (W)).

MARRIED WOMAN AS PLAINTIFF

Practice

A woman married by antenuptial contract excluding the marital power and giving her the free administration of her own property can sue and be sued as if she were unmarried; she need not be assisted by her husband (*Harms v. Malherbe*, 1935 C.P.D. at 170), though the practice of naming the husband and serving process on him is no doubt a wise one. If married under any less extensive contract, she must be sued assisted by him (*ibid.*).

A woman married in community of property has, in general, no *locus standi* to sue or be sued (*Grobler v. Schmellig & Freedman*, 1923 A.D. 501). The action should properly be brought by the husband, or be directed against him, as husband and guardian (*Michler v. Saunders*, 11 S.C. 26; *Klette v. Pfitze*, 6 E.D.C. 134; cited *Harms v. Malherbe*, 1935 C.P.D. at 171-2). But, *semble*, there is an alternative method, by which the wife can sue or be sued in her own name, assisted by her husband, who need not be joined as co-plaintiff or co-defendant (*Harms v. Malherbe* (*supra*)); see, however, *Buck v. Green*, 1932 N.P.D. 425, to the contrary). The right to sue in her own name, duly assisted, may perhaps be limited to personal damage of the nature of pain and suffering, and not extend to such damage as medical expenses incurred by the joint estate (*ibid.*); it will certainly be limited to damage suffered in respect of some act or neglect directly

affecting the wife herself. The Matrimonial Affairs Act, 37 of 1953, does not deprive the husband of his right to sue for compensation for the personal injuries sustained by his wife without her written consent. It merely deprives him of the right to receive any compensation awarded to her by the court (*Ball N.O. v. S.A. Mutual F. & G. Ins. Co.*, 1970 (1) S.A. 186 (E)).

Costs

Where the wife sues assisted by her husband, the joint estate, *semble*, will be liable for costs (*Harms v. Malherbe*); similarly where she is so sued. In a limited class of actions, notably matrimonial proceedings, a wife married in community is entitled to sue her husband (Wille, p. 124). These actions do not sound in damages, and do not fall within the scope of this book; in such actions the question has been much considered whether the joint estate is liable for the costs; the leading authorities are *Levy v. Fleming*, 1931 T.P.D. 62; *Boezaart v. Wenke*, 1931 T.P.D. 70; *Bonthuys v. Priess*, 1933 O.P.D. 59; compare too *Harms v. Malherbe* and *Buck v. Green (supra)*.

IDENTIFICATION OF HUSBAND AND WIFE?

In an action by a wife, married in community of property, for damages for negligence occasioned by the carelessness of defendant, the latter may not set up the defence that her damages were brought about by the joint negligence of her husband and the defendant (*Pretoria Municipality v. Esterhuizen*, 1928 T.P.D. 678; *Plotkin v. Western Assurance Co., Ltd.*, 1955 (2) S.A. 385 (W) at 390; *Rohloff v. Ocean Accident Corp.*, 1960 (2) S.A. 291 (A.D.); *Steinbruecker v. Union Government*, 1947 (1) S.A. 832 (T)) the reason being that she is not the servant or agent of her husband and, moreover, is entitled to recompense for her own personal injuries and damages even although, ultimately, the joint estate may profit thereby. But where the husband is in his own car, which is being driven by his wife, his claim may fail by reason of the fact that he is 'in control' of the vehicle (*Slabbert v. Holland*, 1936 N.P.D. 238 (see *post*, p. 104)). When she so sues her damages are not subject to the Apportionment of Damages Act (*Kleinhans v. African Guarantee & Ind. Co.*, 1959 (2) S.A. 619 (E)). See also *Drinkwater v. Kimber* [1952] 1 All E.R. 701 and *post*, p. 76.

THE STATE (NÉ CROWN)

At common law the Crown was not liable for the delicts of its servants, the underlying principle being that the Queen can do no wrong. This prerogative of the Crown has, however, been trenched upon and, in certain aspects, abrogated by the Crown Liability Act, No. 1 of 1910, repealed and substituted by Act 20 of 1957, which imposes a liability upon the State in respect of any claim which would, if it had arisen against a subject, be a ground of action, whether arising from contract or 'out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant'. In effect the Act places the State in the position of an ordinary litigant, so that a plaintiff is entitled to sue even *in forma pauperis* for negligence (*Barnicott v. Minister of Justice*, 1913 T.P.D. 327).

In view of the provisions of the State Liability Act any regulation made under a statute purporting to give the State absolute exemption from liability is *pro tanto ultra vires* (*Moll v. Department of Irrigation*, 1950 (4) S.A. 158 (T)).

This subject is more fully dealt with by the author in *Master and Servant*, pp. 276–80.

SCOPE

The real object of the Act is that any claim, which would as against a subject, be a ground of action, shall be cognizable by the court if made against the Government (*Minister of Finance v. Barberton Municipality*, 1914 A.D. 335 at 345). It should, therefore, not be limited to claims arising from contracts or delicts of its servants, but will include any illegal act or neglect of legal duty to the extent of making it liable for the acts of its animals (*actio de pauperie*) (*S.A.R. v. Edwards*, 1930 A.D. 3).

LIMITATIONS OF LIABILITY

(a) *Intention of statute*

Statutes are not binding on the State unless the intention that it should be bound clearly appears, either from the language used or from the nature of the enactment (*Union Govt. v. Tonkin*, 1918 A.D. 533 at 541; *Evans v. Schoeman N.O.*, 1949 (1) S.A. 571 (A.D.) at 577; *Raad van Vleisnywerhede v. Min. van Gesondheid*, 1961 (4) S.A. 352 (T)). But servants of the State are personally liable to prosecution for their negligent acts (*R. v. Jones*, 1962 (3) S.A. 1 (F.S.C.)). In *Tonkin's* case the principle was adhered to that, when an Act of Parliament is made for the public good, the advancement of justice and to prevent injury and wrong, the State is bound. The surrounding circumstances, the objects, mischief and consequences of the Act will usually provide a guide in this respect, as where the State is engaged in a commercial enterprise (*ibid.*). Thus it has been ruled that a statute prescribing a speed limit in a certain area is not binding on the driver of a Post Office van (*R. v. De Beer*, 1929 T.P.D. 104), but where such vehicle is in competition with other carriers and is registered as a conveyance and where fees are paid, then the State is bound by the enactment (*R. v. Bishop*, 1929 E.D.L. (J/C. 179/29)).

On the other hand, the penal provisions of the Fencing Act, No. 17 of 1912, do not apply to a servant of the State acting in the execution of his duty, since there is nothing in the language of the Act to indicate that the State should be bound thereby (*R. v. Church*, 1935 O.P.D. 70). In this case the servant had made an unnecessary deviation and negligently left a gate open. Nor can one garnishee a debt due by the State (*Ex parte Venter*, 1940 T.P.D. 286). Again, where it is the duty of an official to prevent sickness of stock his act, in shooting a wounded buck which might possibly die and constitute a threat to stock, would not render him liable to prosecution under the ordinance for shooting game without a licence (*S. v. Huyser*, 1968 (3) S.A. 490 (G.W.)).

The onus is, however, on the plaintiff to show that the State is bound (*Union Govt. v. Tonkin, supra*). In some cases, e.g. the Cape Motor Vehicle Ordinance, specific provision is made that the enactment shall bind the State and servants of the State.

(b) *State's other prerogatives*

The only prerogative of the Crown abrogated by Act 20 of 1957 is its immunity from being cited as a defendant in a court of law, but all its other prerogatives remain. Consequently it is not bound by the terms of section 503 of the Merchant Shipping Act which limits the liability of a defendant shipping company to an amount of £8 sterling for each ton of ship's tonnage (*S.A.R. v. Smith's Coasters*, 1931 A.D. 113).

(c) *Statutory duties*

The liability of the State for the acts of its servants is limited to such acts as are subject to the direction and control of the State as a master of such servant (*Sibiya v. Swart N.O.*, 1950 (4) S.A. 515 (A.D.)). Consequently where the servant is acting in obedience to an injunction of a statute no liability by the State is incurred. The test, whether the duty is imposed by law or not, is, 'has the Crown the power to direct and control him in carrying out his duty?' (*Swarts v. Minister of Justice*, 1941 A.D. 181 at 188).

Citation

When it is necessary to join the State as defendant it is probably unnecessary to cite more than one Minister even though more than one department may be concerned with the subject-matter of the litigation (*Marais and others v. Pongola Sugar Mills Co., Ltd. and others*, 1961 (2) S.A. 698 (N)).

Cases

In the following instances it has been held that the duty carried out was imposed by statute and, consequently, the State was not legally responsible therefor:

Where a magistrate grants an order for the detention of a lunatic (*De Villiers v. Minister of Justice*, 1916 T.P.D. 463).

Where a magistrate, on receiving an intimation of *nolle prosequi* from the Attorney General, fails to release the prisoner with due dispatch (*Swarts v. Minister of Justice*, 1941 A.D. 181).

Where a magistrate receives money from an employer under the Workmen's Compensation Act but refuses to hand it over to a particular claimant (*Smith v. Union Govt.*, 1933 A.D. 363).

Where a policeman wrongfully arrests a person (*B.S.A. Co. v. Crickmore*, 1921 A.D. 107), or where he fails to comply with the statutory duty of handing over the accused's money to a magistrate (*Horn v. Union Govt.*, 1931 C.P.D. 165), but the position is otherwise if he, on instructions, conveys money from one place to another (*ibid.*).

Where the Registrar of Deeds negligently transferred land to another person after receiving notice of attachment from a creditor it was held that the Minister was liable in damages but that, owing to the contributory negligence of the plaintiff in misspelling the name of 'duBruyn' instead of 'de Bruyn', he had to suffer an apportionment of damages to the extent of 50 per cent (*Barclays Bank D.C.O. v. Minister of Lands*, 1964 (4) S.A. 284 (T) at 290).

Prima facie, however, a police officer is a servant of the State, as where he is executing a search-warrant (*R. v. Miller*, 1940 T.P.D. 306). Consequently, it has been held that, in order to escape liability, it is not sufficient for the State to show that the police officer was performing a statutory duty, but that, in order to take the case out of the Act, there must

be a lack of one or more of the essentials of the law relating to master and servant such as that the police officer was performing a duty of a personal nature which made him independent of the control of the State *pro hac vice* for acting in obedience to orders is not acting in pursuance of the Police Act, No. 7 of 1958 (*Khoza v. Minister of Justice*, 1965 (4) S.A. 286 (W)). Here a policeman, indulging in horseplay unconnected with his duty, negligently shot another constable and it was ruled that he was acting in the course of his employment to the extent of making the State liable for his actions. In *Union Govt. v. Thorne*, 1930 A.D. 46, the State was held liable for the negligent driving of mules by a Native police constable. It follows that the State cannot evade responsibility for the action of the police in negligently failing to take proper care of a motor-car belonging to an accused person who has been taken into custody while in possession of the car because their action, in taking possession of the car, was no part of the arrest (*Lawrie v. Union Govt.*, 1930 T.P.D. 402). Section 31 of Act 56 of 1955 protects from responsibility a policeman who under authority of a warrant arrests a person believing in good faith that he is the person named therein. This immunity does not, however, apply where the arrest is illegal, as where he knowingly arrests the son of a man who has the same name (*Ingram v. Minister of Justice*, 1962 (3) S.A. 225 (W) at 229).

In *Sibiya v. Swart N.O.*, 1950 (4) S.A. 515 (A.D.), the State was held liable in respect of an assault on a prisoner by the police, the assault having taken place while the prisoner was being conveyed to the police station. Here it was held that, although the assault took place while the constable was performing a statutory duty, he was, nevertheless, in respect of this duty, subject to the control and supervision of his superior officers and his employer, the State. On the other hand, where a policeman used excessive force in arresting plaintiff, it was held that the State was not liable since the policeman was carrying out a duty of a personal nature and was not acting as a servant of the State (*David v. Minister of Justice and others*, 1961 (2) S.A. 626 (E)) since he was exercising only his personal judgment, but if he committed any such act after arrest and in taking the arrestee to the police station, he would be acting as a servant of the State (*Sibiya v. Swart N.O.* (*supra*) at 520).

It is only when the duty imposed by law has the effect of depriving the State of the power to direct or control him in carrying out his duty that *pro hac vice* he cannot be regarded as a servant of the state.

A member of the National Volunteer Brigade is a servant of the State, consequently the State was held liable for his act in shooting complainant either accidentally or negligently (*Saunders v. Union Govt.*, 1947 (1) S.A. 100 (W)).

For decisions on exceptions raised by the Government where the summons failed to set forth that the police officer was performing a statutory duty see *Union Govt. v. Mentor*, 1926 C.P.D. 324, and *Minister of Justice v. Wilson*, 1930 T.P.D. 36.

(d) *Prescription—Limitation of actions*

In many cases special time limits are fixed within which a Government department may be sued for injuries sustained. Thus the Railway Administration cannot be sued unless legal proceedings are commenced within

twelve months after the cause of action has arisen (section 64(1), Act 70 of 1957). Moreover no legal proceedings shall be commenced until one month at least after the written notice of intention to commence proceedings has been served upon the Administration (section 64(2), *ibid.*). This provision does not apply, however, to the cessionary of a claim who lodges its claim before the actual date of the agreement of cession (*Legal & General Assurance Co. v. S.A.R. & H.*, 1962 (1) S.A. 660 (O)). The court has the power to grant condonation for the late filing of a claim (*Pretoria C.C. v. S.A.R. & H.*, 1956 (4) S.A. 87 (T)). The Defence Act (section 113, Act 44 of 1957) contains similar provisions, save that the period within which action must be commenced (after one month's written notice) is six months.

The Police Act (section 32, Act 7 of 1958) also provides that any civil action against the State or any person in respect of anything done in pursuance of the Act shall be commenced within six months after the cause of action has arisen and notice in writing showing the cause thereof shall be given to the Administration one month at least before the commencement thereof. The wording of this section now makes inapplicable the decision in *Union Govt. v. Rosenberg (Pty.) Ltd.*, 1946 A.D. 120, and reinstates the decisions in *Struwig v. Minister of Justice*, 1933 W.L.D. 220, and *Woodiwiss v. Union Government*, 1937 N.P.D. 101.

In regard to actions against the Railway Administration it has been held by Snyman J. in *Evert v. Minister for Railways and Harbours*, 1960 (3) S.A. 841 (T), that the plaintiff must both allege and prove that the statutory written claim has been duly lodged and that there is no necessity for the Administration to plead non-compliance with the requisite one month's notice prescribed by section 64 of the Act. This decision has, however, been distinguished and its correctness doubted by Miller J. in *Mgobozi v. The Administrator of Natal*, 1963 (3) S.A. 757 (D) at 759, and also by Dowling A.J.P. in *Rhame v. The State*, 1963 (3) S.A. 25 (T) at 26-7. The conclusion to be drawn is that each particular statute is dependent upon its own provisions and that *Evert's* case applies only to actions governed by the Railways Act. (See also *post*, p. 517.)

Waiver. Whether a public body is entitled to waive the prerequisite of the statutory notice of action has been doubted by Boberg in *Annual Survey*, 1964, p. 152, but it is submitted that it may do so since this is merely a procedural matter or step made for the benefit of the defendant's convenience (*Rhame's* case (*supra*) at 26 and *Steenkamp v. Peri Urban Areas Health Board*, 1946 T.P.D. 424 at 429). (See also *post*, pp. 150, 524.)

Cases

Notice is effectively given where the correspondence between the parties indicates unequivocally that one intends to bring an action (*Mphelo v. Bruwer*, 1951 (1) S.A. 433 (T)).

This limitation of action, being a condition which clogs the ordinary right of an aggrieved person to seek the assistance of the court, should be strictly construed and should not be extended to cases beyond which it expressly applies (*Union Govt. v. Rosenberg (Pty.) Ltd.*, 1946 A.D. 120 at 129; *Khoza v. Minister of Justice*, 1965 (4) S.A. 286 (W) at 289).

The obligation to give written notice is peremptory and in default thereof no claim (summons) can come into existence, even if the duration thereof is a minute less than one month (*Dease v. Minister of Justice*, 1962 (2) S.A. 302 (T)).

An action is 'commenced' within the meaning of section 32 of the Act, when summons is served (*Nxumalo v. Minister of Justice and others*, 1961 (3) S.A. 663 (W)).

Whether an act has been done 'pursuant to the Act' within the meaning of section 32, the proper test to apply is the subjective test of the police officer (*Ngubane v. Div. Comm. S.A. Police, Witwatersrand Div.*, 1963 (1) S.A. 316 (W)).

While it is difficult to conceive of any duty normally assumed by the Police Force to be a policeman's duty which would fall outside the expression 'anything done in pursuance of the Act' in section 32, the Court, nevertheless, in *Masikane v. Smit and another*, 1965 (4) S.A. 293 (W), declined to dismiss the defendant's plea until all the evidence had been heard.

In terms of section 32 of Act 7 of 1958 notice of action given to the Commissioner of Police is sufficient notice to the State (*Van Biljon v. Minister of Justice*, 1961 (3) S.A. 586 (T)).

The notice envisaged by section 32 requires no more than that the plaintiff should set out the facts which give rise to the proposed action (*Dease v. Minister of Justice*, 1962 (3) S.A. 215 (T)).

For Limitations of Actions against Municipalities see *post*, p. 149, and in respect of other public bodies see *post*, p. 514.

The Prescription Act is binding on the State when it appears as a claimant in an action (*Union Govt. v. Tonkin*, 1918 A.D. 533). Moreover, since Government departments are usually their own insurers, they would be bound by the provisions of the Motor Vehicle Insurance Act which is dealt with *post*, p. 516.

(e) *Special immunities*

Notwithstanding the provisions of the State Liability Act, No. 20 of 1957, there exists certain statutory provisions which expressly exempt the State from liability for damages. Thus Proclamation No. 154 of 14th October, 1921, stipulates that this Act does not apply to the Transkei in respect of liability for acts or omissions in relation to the construction, maintenance or repair of roads. The Post Office Act (No. 44 of 1958, section 115) also provides complete exemption for negligence in respect of postal articles or telegrams submitted through its agency.

(f) *Interdepartmental disputes*

One department of the Government cannot sue another department, since both are parts of the same *persona*, and this includes provincial administrations (*Natal Provincial Administration v. S.A.R.*, 1936 N.P.D. 643).

(g) *One-sided statutes of limitation*

Section 1(2) of Act 34 of 1956 now provides:

'Where in any case to which the provisions of subsection (1) apply, one of the persons at fault avoids liability to any claimant by pleading and proving that the time within which the proceedings should have been instituted or notice should have been given in connection with such proceedings in terms of any law, has been exceeded, such person shall not, by virtue of the provisions of the said subsection, be entitled to recover damages from the claimant.'

In other words the defendant can plead in bar, but may not counter-claim and seek an apportionment of damages in his favour.

PUBLIC OFFICIALS

The liability of public officials for negligence in the performance of their duties is discussed *post*, p. 149.

CHAPTER III

GENERAL DEFENCES

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Within the compass of this work it is not expedient to deal exhaustively with the general defences available in a delictual action. Only such defences as have a common application to actions founded upon negligence are herein discussed.

1. STATUTORY AUTHORITY

There can be no liability for doing an act which the legislature has specially authorized even though damage is caused to another provided it is performed without negligence (*Union Govt. v. Sykes*, 1913 A.D. 156 at 169, and *Geddis v. Proprietors of Bann Reservoir*, 3 A.C. 455).

The defence of statutory authority is fully dealt with in *Johannesburg Municipality v. African Realty Trust*, 1927 A.D. 163; other leading authorities are *Tobiansky v. Johannesburg Town Council*, 1907 T.S. 134; *Union Govt. v. Sykes*, 1913 A.D. 156; *New Heriot G.M. Co. v. Union Govt.*, 1916 A.D. 415; *Breede River Board v. Brink*, 1936 A.D. 359; *Bloemfontein Town Council v. Richter*, 1938 A.D. 195 at 230, and *Reddy v. Durban Corporation*, 1939 A.D. 293.

It is impossible to summarize the judgment of Innes C.J. in the first-mentioned case, every word of which has its value, but the following points may be emphasized:

- (a) The primary question is whether the statute in question **justifies an interference** with private rights. If it does not, there is an end of the matter: anyone whose private rights have been interfered with (without, of course, some *other* justification) has his remedy. This is a question of construction in every case.
- (b) There is a **presumption against** an intention to authorize interference with private rights where the statute does not provide for compensation; but this presumption loses much of its force when the powers are conferred on a public body acting in the public interest.
- (c) Where the work authorized is **defined and localized**, e.g. the construction of a railway from one place to another, especially if it is in the **public interest**, the intention will readily be inferred. So will it be if the act authorized must necessarily interfere with private rights.
- (d) Where the powers are **general** and not localized, and do not necessarily involve such interference, the inference will ordinarily be that interference is not authorized. But in such cases, if the person or body authorized can show that under the circumstances of the case it is **impossible to carry out the work** without such interference, then the inference of authority to interfere will arise; for otherwise the grant of statutory authority would be nugatory.
- (e) Where the authority is **directory** the inference is clear that the legislature intended to grant immunity from the consequence of its exercise in the manner authorized for otherwise the powers conferred would be useless (at 172).
- (f) Where the statute does confer authority to interfere with common-law rights, the exercise of the power is limited by a further consideration, namely, that it must be carried out **without negligence**. (See also *Parker v. Union Govt.*, 1945 P.H., J. 11 (C).) This means something more than mere careful operation, e.g. care in the actual operation of a train; it includes care in the selection of the site, in the lay-out of a line of railway, in the selection of machines and materials. 'If by a reasonable exercise of the powers given by statute or common law the damage could be prevented, it is negligence not to make such reasonable exercise of such powers.' (See also *Johannesburg C.C. v. Vucinovich*, 1940 A.D. 365.)
- (g) The **onus** of establishing any facts necessary to show the intention to grant authority to interfere with common-law rights, e.g. proof that it is impossible to carry out the work without such interference, is on the person or body raising the defence (at 175).

- (h) 'Impossibility', *semble*, is to be construed relatively to the circumstances, such as the **financial resources** of the person or body and the local requirement and conditions (*ibid.*, at 174).
- (i) But once the authority to interfere is established, the onus is on the plaintiff to show that there was negligence in the exercise of the powers given; and the **test** is whether measures were not taken which were 'reasonably practicable' (*ibid.*, at 177). Altogether disproportionate expense is an element to be taken into consideration. (See also *Breeders River Irrigation Board v. Brink*, 1936 A.D. at 366.) In other words the plaintiff must prove that by the adoption of certain precautions reasonably practicable, or of another method of construction, damage to the plaintiff's land could have been avoided (*Reddy v. Durban Corporation*, 1939 A.D. 293). (See also *post*, pp. 277-8.)

Illustrative cases

Johannesburg Municipality v. African Realty Trust, 1927 A.D. 163: A municipality had permissive powers to construct and maintain streets, drains and sewers. It was proved that such powers could not be exercised without increasing the flow of water on to the lower ground. Held, that the statute (Ordinance of 1912) authorized this interference with the common-law rights of the lower proprietors, of whom plaintiff was one, but that it did not authorize the bringing on to such lower ground of water which would not normally have come there at all. Held, further, that it had not been established that any measures reasonably practicable could have been adopted other than those actually adopted, in dealing with water which would naturally flow on to plaintiff's land; the suggested alternative being unreasonably difficult and expensive. An interdict was, therefore, refused in respect of such water; but granted in respect of water which would not naturally so have flowed.

Gibbons v. S.A.R., 1933 C.P.D. 521: The Administration held authorized to interfere with common-law rights by erecting sheds from which smoke and soot emerged, provided that there was no negligence. Held, however, that there was negligence both (*semble*) in the design of the sheds and in the operations carried out in or near them. The sheds were erected without expert consideration of the question of smoke and soot. 'Until the question has been fully investigated, and the necessary measures have been taken or it has been shown that there are no reasonably practical measures, the Administration is not entitled to statutory protection.' Damages were awarded and the Administration was warned that it would lay itself open to further action unless the matter of the smoke nuisance was fully gone into.

New Heriot G.M. Co. v. Union Govt., 1916 A.D. 415: The Administration was held liable for the negligent laying of a railway track, in respect of increase of flow of water.

Johannesburg C.C. v. Vucinovich, 1940 A.D. 365: A provincial Ordinance authorized the carrying on of sewerage disposal works by a municipality, and provided that a municipality shall not be liable for any nuisance of damage 'which is the inevitable consequence of a proper and ordinary conduct in sewerage farm disposal'. Held, that the words 'proper and ordinary conduct' mean ordinary precautions and that the section created no immunity where the municipality failed to adopt reasonable precautions as would be necessary to protect private individuals.

Union Govt. v. Sykes, 1913 A.D. 156: The Administration held not liable for fire caused by sparks from engine, it not being proved that the spark-arrester was defective or not of reasonably good design.

Tobiansky v. Johannesburg C.C., 1907 T.S. 134: The municipality had power to remove and deposit night-soil; but the powers were general and not localized. There was no proof that the spot selected was the only possible one for such deposit. Held, it was liable for resulting nuisance. See this case explained in *African Realty Trust*, at 173.

Pretoria Municipality v. Wolhuter, 1930 T.P.D. 761: The power to plant trees in a street does not excuse allowing such trees to become a danger to traffic by reason of overhanging boughs. (Case on exception.)

Germiston C.C. v. Chubb & Sons Lock and Safe Co., 1957 (1) S.A. 312 (A.D.): In an action against a local authority for damages caused by flooding as a result of road-making operations, the discharge of the initial onus, i.e. to satisfy the Court that the legislature contemplated an interference with private rights, is in effect automatic. As regards the onus, which is then on the landowner to prove that the local authority was not entitled to the protection of the statute because the injury complained of was due to a negligent exercise of its powers, the court must have regard to the total requirements and resources of the local authority and not merely to the means of providing protection to an individual landowner.

2. JUDICIAL AND QUASI-JUDICIAL ACTS

In Roman-Dutch law, a judge is not liable for negligence in the exercise of his office (Voet 5.1.58; Groen., *ad Inst.* 4.5 pr.; *Norman-Scoble on Evidence*, p. 311; *Penrice v. Dickinson*, 1945 A.D. 6; *Cooper v. The Government*, 1906 T.S. 436).

The same principle is applied to those who act in a quasi-judicial capacity, for example, assessors, arbitrators, members of commissions, etc. (*Pollock on Tort*, pp. 122-3, and *Klip River Licensing Board v. Ebrahim*, 1911 A.D. 456; *Transvaal Coal Owners Assn. v. Board of Control*, 1921 T.P.D. 447). and it applies whether the authority so to act is statutory, or arises from the agreement of the members of a voluntary association such as a trade union or a club. Per De Villiers J.A. in *Matthews v. Young*, 1922 A.D. 492 at 508:

'Where, under the rules of an association, there is a duty imposed upon a body of persons under certain circumstances to consider the conduct of a member and in their discretion to take appropriate action, such persons are not liable so long as they in good faith act or purport to act under the rules of the association in the interests of the association but, through *imperitia*, err in following the rules or in their proper application. They are acting in a quasi-judicial capacity, and are therefore not liable for any damage provided they act bona fide and in the honest discharge of their duties.'

It will be observed that the immunity covers error both in the following of the rules and in the actual decision on the facts. The immunity protects the members themselves from liability; it does not mean that the actual decision may not be set aside if it was in fact erroneous (*ibid.*). *Dolus*, of course, will ground an action. See also *Lucas v. Wilkinson*, 1926 N.P.D. 10, and *Abrahamse v. Phigeland*, 1932 C.P.D. 196.

The principle does **not apply to ministerial as distinct from judicial acts**. For the negligent breach of a ministerial act, whether imposed by statute or by consent, there may well, in appropriate circumstances, be liability to a person injured thereby, provided the damage is directly caused by it and provided the person injured can establish that the duty was one owed to him. Cases are collected in the chapter on Municipalities and Public Bodies (*post*, p. 143) in which officials have been held liable for negligence in the performance of their statutory duties. See too the remarks on 'statutory *culpa*' (*ante*, p. 5).

3. DEFENCE AND NECESSITY

Self-defence is clearly a good legal defence as against the aggressor, provided the action taken was **necessary and reasonably commensurate with the threatened danger**. Is it a defence against third parties? Paulus has a curious passage in the *Digest* (9.2.45.4): 'If to defend myself I throw a

stone at my adversary and hit not him but a passer-by, I am liable under the *lex Aquilia*; for I am allowed to strike only the man who brings force against me.' This may mean that the act of throwing the stone, though the aggressor could not complain of it, was unreasonably dangerous to third parties. Probably the test to be applied is the ordinary test of negligence. If the act is such as a prudent man might resort to in the circumstances, even third parties have no right of action in respect of its consequences. And one who acts in self-defence, like one who acts in a sudden emergency (see *ante*, p. 30), will not be judged as though he had had time for reflection. (See also *Pollock on Torts*, 15th ed., p. 121.) The shooting of a dog which is attacking sheep or cattle would be a justifiable measure of self-defence (*Creswell v. Sirl* [1947] 2 All E.R. 730 (C.A.)).

Where a man is threatened with a natural danger, such as locusts, he is entitled to defend himself, e.g. by driving them off, even if the result is to send it upon his neighbour (*Greyvenstein v. Hattingh* [1911] A.C. 355). In respect of flood-water, the rule may perhaps be different; flood-water differs only in quantity from what is a normal incident of ordinary life, as to which the rule is clear that the flow on to your neighbour's land may not be concentrated or increased, except by reasonable and proper cultivation in the usual way (see *post*, p. 226). In England, a landowner may prevent flood-water from coming on to his land (*Maxey Drainage Board v. G.N. Railway*, 106 L.T. 129; *Gerrard v. Crowe* [1921] 1 A.C. 395); but *possibly* he may not discharge it on to his neighbour's property in concentrated flow, even to defend his own land (*Whalley v. L. & Y. Railway*, 13 Q.B.D. 131 at 140). In relying upon the defence of necessity (or self-defence) the onus is always upon the defendant to allege and prove such defence (*Esso Petroleum Co., Ltd. v. Southport Corporation* [1955] 3 All E.R. 864 (H.L.)). (Here the defendant ship-owner had discharged a considerable quantity of oil in order to lighten his ship, thereby causing damage to the respondent's foreshore.)

4. ACCIDENT AND MISTAKE

To an action based on the modern application of the *lex Aquilia*, *casus* (inevitable accident) is clearly a defence. '*Impunitus est qui sine culpa et dolo malo casu quodam damnum committit.*' 'Accountability for unintentioned injury depends upon *culpa*' (per Innes C.J. in *Cape Town Municipality v. Paine*, 1923 A.D. 207 at 216).

(a) Nuisance and Negligence

Nevertheless, there are in our law, as in the law of England, certain remedies available to an injured person, which do not fall within the principles of the *lex Aquilia*, and in which *culpa*, at any rate in the sense of negligence, is immaterial. These are the remedies for what are nowadays described as 'nuisances'. If I cause *soot or smoke* to go upon my neighbour's land, I am liable to him; and it is no defence for me to show that I took the utmost pains, and consulted the best authorities, in the construction and operation of my fire. This is a thing that I may not do; unless I have a statutory or prescriptive right, the question of my negligence is immaterial. We may say, if we wish, that to send the noxious thing upon

my neighbour's land is itself *culpa*; but then *culpa* is used in a wider sense, not as equivalent to negligence (compare *ante*, p. 4).

The difficulty is to draw the line between such infringements upon the rights of one's neighbour as are to be treated as 'nuisances', remediable without proof of negligence, and such infringements as, being remediable under the *lex Aquilia*, require *culpa* if the remedy is to be available. This is a matter in which the historical element in a legal system is of paramount importance. In considering whether, say, an escape of water is to be treated as matter of nuisance or of negligence, the manner of treatment in the past will be all-important. And the same will be true of similar questions, relating, for example, to the escape of other noxious substances, to excavations near highways, to trespass by animals. In practice, the problem becomes of importance in connection with liability for the escape of noxious substances, e.g. *electricity*, and of *water*; in that connection it is discussed *post*, p. 218. Here it will be sufficient to remark that our law is apparently much less ready than is the law of England to regard an action for damages as falling under the head of nuisance. In our law, the *actio legis Aquiliae* is the primary action for patrimonial damage; and it seems safe to say that a plaintiff who sues for damages based not upon *culpa* or *dolus* must establish affirmatively that by Roman-Dutch law he has such a remedy—the presumption is that he has not. So in respect of excavations near a highway, which English law regards as nuisances, our law deals with them under the *lex Aquilia*, on the basis of *culpa* (see per Innes C.J. in *Fleming v. Rietfontein Co.*, 1905 T.S. 111 at 116, cited and applied in *Transvaal & Rhodesian Estates v. Golding*, 1917 A.D. 18 at 27). English law, having no general action for damage similar to the *lex Aquilia*, has much more readily admitted actions for damages as falling within the category of nuisance: besides, the recognition of inevitable accident as a good defence is in that law a matter of quite recent history (see for example Holmes, *The Common Law*, p. 82 et seq.). From which it follows that English authorities must be accepted only with the greatest reserve; and that English doctrines of absolute liability (such as the doctrine in *Rylands v. Fletcher*) should not be imported into our law unless supported by Roman-Dutch authority. (See *post*, p. 217.)

(b) *Mistake*

In Roman law the defence of bona fide mistake was a good defence to an action under the *lex Aquilia* provided it was founded on reasonable grounds, but in modern law (criminal prosecutions excepted) the position is otherwise (*Shah Mahomed v. Hendriks*, 1920 A.D. 151 at 158), the rule being that if the defendant had knowledge that his act would entail an invasion of the plaintiff's rights, it is not competent for him to plead that he bona fide believed that his action was justified, however reasonable such belief may have been, if in truth no legal justification existed for his actions (*ibid.*). Per Wessels J.P. in *Cohen Lazar & Co. v. Gibbs*, 1922 T.P.D. 142 at 145:

'If a person, by his own unauthorized act, intentionally injured an innocent person in his property, the latter is prima facie entitled to damages for loss caused to him. If the law were otherwise an innocent third person, whose person was wrongfully arrested or whose goods were wrongfully seized, would be wholly unprotected. Such a state of affairs is inconceivable.'

This rule is based on the proposition that no man is entitled to take the law into his own hands (*Nino Bonino v. De Lange*, 1906 T.S. 120. See also *Mans v. Loxton Municipality and another*, 1948 (1) S.A. 966 (C)).

5. VIS MAJOR—ACT OF GOD

A particular case of inevitable accident is *vis major*. Strictly speaking, this defence includes, but is wider than, the defence of 'Act of God' for it includes such cases as the interference of sovereign or hostile force (e.g. *Hay v. King William's Town D.C.*, 1 E.D.C. 97). But in common usage *vis major* is employed in a narrower sense, and the two terms are treated as interchangeable.

Vis major, in this narrower sense, includes 'all direct acts of nature the violence of which could not reasonably have been foreseen or guarded against' (per Innes C.J. in *New Heriot G.M. Co. v. Union Govt.*, 1916 A.D. 415 at 433). By a 'direct act of nature' is meant an occurrence in which there has been no human intervention. It is not necessary that the occurrence should have been violent in the sense of being catastrophic—the essential element is that it should have been so exceptional in its severity that the reasonable man would not have foreseen it. See also *Bayley v. Harwood*, 1954 (3) S.A. 498 (A.D.) at 503. Of course, if he could, or ought to have foreseen it (e.g. an exceptional flood) he may not set up the defence of *vis major* (*Adm., Natal v. Stanley Motors, Ltd. and others*, 1960 (1) S.A. 690 (A.D.)).

The defence, which applies in contract as well as in delict, is in essence a denial of negligence. But it is a very special kind of denial, which is available in cases where the ordinary denial would not be sufficient. Thus, in contract, it avails the common carrier; and in delict, even if the absolute liability established for English law by *Rylands v. Fletcher* is no part of our law (see *post*, p. 217), it affords an exception to that liability. The common application of the defence is in cases of flood; but in principle it is not confined to them, for in *Moffat v. Rawstorne*, 1927 T.P.D. 435, it was also applied to lightning.

Since an act of God is an event which could not reasonably have been anticipated, it follows that an occurrence which in one country, or even district, would be regarded as clearly within this definition might in another country, where the climatic conditions are different, be treated as one which should have been foreseen. So in *Durham's* case, 1869 Buch. 302, Bell C.J. accepted the law as laid down by the Privy Council in *Braid's* case, 1 Moo. P.C. 121, that where a work is constructed it should be built 'in such a manner as to be capable of resisting all the violence of weather which in the climate of that country might be expected, though perhaps rarely, to occur'; a principle which was applied by the Appellate Division in the *New Heriot Gold Mining Co. v. Union Govt.*, 1916 A.D. 415, and in *Adm., Natal v. Stanley Motors (supra)*. See also *City of Montreal v. Watt & Scott, Ltd.* [1922] 2 A.C. at 563.

The onus of establishing that the occurrence was one which could not reasonably have been foreseen is on the party pleading the defence (*New Heriot* case). But where that party establishes that the damage was caused by such an agency as a stroke of lightning, which 'prima facie is a force against which even civilized man is impotent and in respect of which he

takes his chance', it is for the plaintiff to show that effective precautions can and should be adopted against its effects (*Moffat v. Rawstone, supra*). In that case the wall of a building in course of erection was struck and fell upon plaintiff's property: No evidence was before the Court to show what precautions if any could have been taken. Held, that it was for the plaintiff to produce such evidence and judgment was entered for the defendant.

Illustrative cases

New Heriot G.M. Co. v. Union. Govt., 1916 A.D. 415: Plaintiff's mine was flooded by stormwater concentrated by the Administration's railway embankment. The rainfall was about 3 inches in one hour. Held, not *vis major* in the Transvaal. Contrast *Tilbrooke v. Port Elizabeth Municipality*, 1909 E.D.C. 299, 4 Buch. A.C. 37, where 1½ inches in an hour was held for that district to be *vis major (sed quare)*. In *Manuel v. Capetown Municipality*, 1877 Buch 107, 2 inches in eleven hours was held not to constitute *vis major*.

Moffat v. Rawstorne, 1927 T.P.D. 435: Lightning—see the facts set out in the text above.

Hay v. King William's Town D.C., 1 E.D.C. 97: Action for damages consequent on non-repair of a road. Held, that a plea of impossibility due to hostilities in the neighbourhood disclosed a good defence.

Milne v. Durban Corporation, 1938 N.P.D. 488: The defendant placed five hurricane lamps round an obstruction in a street, but owing to torrential rains and gusty wind, they blew out. Held, that defendant was liable in damages.

In a country like South Africa, where exceptionally heavy storms are to be expected, a bridge should be built to withstand heavy and violent floods and the fact that a railway bridge, near the site in question, had stood for forty years, did not absolve the Natal Administration from liability when the road approach to the bridge was washed away by scour (*Adm., Natal v. Stanley Motors, Ltd. and others*, 1960 (1) S.A. 690 (A.D.) at 699).

6. VOLENTI NON FIT INJURIA

No one can complain of an injury or damage to which he has agreed, either expressly or impliedly, that he should suffer (Dig. 47.10.1.5; Grotius 3.35.8; Voet 9.2.24 and 47.10.4). Accordingly, where a person, who knows of and appreciates a risk, voluntarily subjects himself to it, he cannot complain if damage results to him. For this principle there is no convenient name in common use; it is sometimes spoken of as 'assumption of risk', but is usually identified by the phrase *volenti non fit injuria* (*Lampert v. Hefer*, 1955 (2) S.A. 507 (A.D.)).

The principle is well recognized in the Roman-Dutch authorities. The actual phrase comes from Aristotle (*Ethics*, 3.11), and is used by Gothofredus (note to Dig. 43.29.3.5); Matthaeus (*De Crim. Proleg.*, 3.3); Wissenbach (*ad Dig.*, 47.10.1.5), and Gayl (*Obs.* 2.39.18, 84.1), while Peckius (*Regulae Juris Canon.*) has the improved version, *scienti et consentienti non fit injuria*. The last-mentioned authority devotes a chapter to the principle; Huber (*Praelect.*, 4.4) discusses it from the ethical aspect; Matthaeus (l.c.) deals with it at some length both from the criminal and the civil aspect. Our courts, however, have so far been content to follow English case law; which, probably because the Chancellors were canon lawyers, appears accurately to embody the effect of the Roman and civil authorities. Nevertheless, a reference to those authorities may still prove useful on occasion.

The rule is of application to both players and spectators of **sporting activities** receiving injuries either while playing or in watching the event provided it is properly played and according to the rules (*Hall v. Brook-*

lands Auto Racing Club [1933] 1 K.B. 205 (C.A.) at 209). Here Scrutton L.J. referred to such sports as cricket, football, hockey and polo matches and also to people watching flying machines. Here it was also held that the proprietors of the grounds are not liable provided they take reasonable precautions, for they are not 'insurers'. See also *Wooldridge v. Sumner* [1962] 2 All E.R. 978 (C.A.) (photographer at gymkhana) where Sellers L.J. said:

'provided the competition or game is being performed within the rules and the requirements of the sport and by a person of adequate skill and competence, the spectator does not expect his safety to be regarded by the participants.'

See also Goddard's comment thereon in 'The sportman's charter' in (1962) 78 *L.Q.R.* 490 and *Broom v. Administrator, Natal*, 1966 (3) S.A. 505 (D) at 516-17; Halsbury (vol. 28) section 89, and *Murray and another v. Harringay Arena, Ltd.* [1951] 2 All E.R. 320 (C.A.), where a child spectator, injured in watching a game of ice hockey, was found to have impliedly assumed the risk of injury. *Broom's* case turned on the question of negligence. Here a number of schoolboys, under the supervision of a master, were playing a game of baseball or 'rounders', the striker using a wicket stump without a metal tip to it. In striking the ball the stump flew out of the striker's hand and injured plaintiff, who was standing fourth in a queue of boys awaiting their turn to bat. Here the Court held that the probable lack of seriousness of the harm and the small chance of its happening were such that negligence on the part of the master had not been established.

The rule has also been applied to a person standing on a highway outside a cricket ground who was injured by a batsman playing therein and where it was held that the possibility of such person being struck was so small that it could not have been anticipated by any reasonable man (*Bolton and others v. Stone* [1951] 1 All E.R. 1078 (H.L.)). Negligence, however, on the part of a player, as where a golfer, in demonstrating how a shot should be played, strikes and injures a person standing near by, will not exculpate him from liability (*Cleghorn v. Oldham* (1927) 43 T.L.R. 465: see also *post*, p. 213).

In this regard it is not unknown that a number of organizers of sporting events, where injury is a likely possibility to the spectators attending the event in question, to take out some form of third party insurance as a precaution against possible actions for damages.

The rule would also properly apply to operations performed by surgeons, provided they are performed without negligence and the patient is adequately informed of the inherent dangers thereof (*Estherhuizen v. Administrator, Transvaal*, 1957 (3) S.A. 710 (T)). But assent to one type or kind of operation would not cover a different type of operation. (See *post*, p. 134.) Other cases of the *volenti* rule would be found in the going of a man upon land where he knows that there is a danger; and also to the casual and unintentional jostling which a person may suffer in a busy street.

It can also arise where a person, knowing of the high degree of intoxication of the driver of a motor-car, nevertheless voluntarily assumes the risk of travelling in that car as a passenger (*Lampert v. Hefer*, 1955 (2) S.A. 507 (A.D.)). In this case it was held that the defence of contributory negligence

and *volenti non fit injuria* could overlap as where the state of the driver's incapacity to drive was so patent that it was negligent for the plaintiff's passenger to fail to observe and appreciate the danger of travelling in the driver's car. In *Lampert's* case, Schreiner and Fagan JJ.A. disagreed with the decision of Asqueth J. (*contra*) in *Dann v. Hamilton* [1939] 1 K.B. 509, [1939] 1 All E.R. 59 (K.B.).

The defence is distinct from that of contributory negligence, though in practice it may sometimes cover the same ground (*Union Govt. v. Mathee*, 1917 A.D. 688 at 703). The plea of contributory negligence came into operation only if the defendant was himself negligent; and it alleges negligence in the plaintiff in voluntarily assuming a grave risk as in *Van der Vyver v. Netherlands Insurance Co. of S.A., Ltd.*, 1967 (2) S.A. 476 (T) at 482. But the plea of *volenti* does not admit negligence in oneself; nor is it an allegation of negligence in the plaintiff, since the assumption of risk need not constitute negligence (cf. *R. v. Tatham*, 1968 (3) S.A. 130 (R.A.D.); *Stern v. Podbrey*, 1947 (1) S.A. 350 (C) at 359 *volenti* not pleaded nor properly investigated, but plaintiff found guilty of contributory negligence). See also *Slater v. Clay Cross & Co., Ltd.* [1956] 2 All E.R. 625 (C.A.). It is distinct too from a denial of negligence; for, if a defendant can successfully establish consent, it is immaterial whether his act was negligent or not (cf. (1964) 81 *S.A.L.J.* 179 at 332). The consent must, however, be that of the person injured and not of a third party so that the permission of the owner of a farm to spray the land with some arsenical preparation does not affect the liability of the defendant for injury caused to other people living on the farm (*Mordt N.O. v. Union Govt.*, 1939 T.P.D. 103). (See also *post*, p. 89.)

An example of the application of the *volenti* rule in criminal law is to be found in the decision of *Ex parte Minister of Justice: in re S. v. Van Wyk*, 1967 (1) S.A. 488 (A.D.), where a trespasser, acting with criminal intent, had entered premises knowing that a spring gun had been erected therein and had been killed by it: Here the accused had been found not guilty of murder, and his acquittal was confirmed on an appeal by the Minister against the lower court's decision.

ESSENTIALS

To establish the defence it is necessary to show affirmatively:

- (a) That the risk was known;
- (b) that it was realized, and
- (c) that it was voluntarily undertaken.

'Knowledge, appreciation, consent—these are the essential elements. But knowledge does not necessarily imply appreciation, and both together are not necessarily equivalent to consent' (per Innes C.J. in *Waring & Gillow v. Sherborne*, 1904 T.S. 340; *S.A.R. v. Cruywagen*, 1938 C.P.D. at 225), for there is no *volens* unless plaintiff was in a position to choose freely (*Merrington v. Ironbridge Metal Works, Ltd. and others* [1952] 2 All E.R. 1101). Nor does mere awareness of the risk imply a consent to the assumption of it (*Durban C.C. v. S.A. Board Mills, Ltd.*, 1961 (3) S.A. 397 (A.D.) at 406-7).

The onus of proof is on the defendant (*Stolzenberg v. Lurie*, 1959 (2) S.A. 67 (W)). It necessarily follows that the defence is one extremely

difficult to establish. It will more easily be established in cases where an occupation is undertaken to which certain risks are necessarily incidental, e.g. attendant at a lunatic asylum (*McMorrow v. Colonial Government*, 23 S.C. 626); it will be established only with the greatest difficulty where the risk is not inherent in the occupation but arises only incidentally, from some lack of proper precaution. See *Union Govt. v. Mathee*, 1917 A.D. 688.

The voluntary assumption of one risk does not absolve the defendant from liability for another risk to which the plaintiff neither expressly nor impliedly consented to subject himself (*S.A.R. v. Cruywagen*, 1938 C.P.D. at 225, and *National Meat Suppliers v. Cape Town C.C.*, 1938 C.P.D. 498). See also Strauss in (1964) 81 *S.A.L.J.* 179.

Justifiable risk

There are certain risks which a person is entitled to take, without at the same time forfeiting his claim to damages consequent upon the negligence of others. Such instances arise when the risk is incident upon the assertion of a **right**, such as the crossing of a street, or in the performance of a **duty** (*Smith v. Baker* [1891] A.C. 337). It follows that a cab-driver, who found that the entrance to his stable was impeded by a trench but who nevertheless led his horse over it, was entitled to damages for injury to his horse in the process (*Clayards v. Dethick* (1848) 12 Q.B. 439). Again, where a policeman attempted to stop a horse which had been negligently left unattended in a street, and was injured in the process, it was ruled that his assumption of risk in response to his *call of duty* did not bar him from recovering damages (*Haynes v. Harwood* [1935] 1 K.B. 146; *D'Urso v. Sanson* [1939] 4 All E.R. 26 (K.B.) at 29. The risk must, however, not be out of proportion to the right asserted or the duty performed, for no man may insist on asserting his rights in the face of certain injury.

Where there is no duty, however, it seems that an intervening party acts on his own risk (*Cutler v. United Dairies (London) Ltd.* [1933] 2 K.B. 297) (*ante*, p. 36), although an exception may perhaps be made in a matter where both the plaintiff and the defendant have a *joint interest* (*Hayett v. G.W. Railway Co.* [1947] 2 All E.R. 264 (C.A.)).

Contracting out

A typical method of excluding liability in delict is to be found in what is commonly termed 'contracting out' by a person who would normally attract liability for his acts or omissions, and is usually to be found in contracts with carriers (e.g. the Railway Administration, sea transport to Robben Island, and the gold mines in permitting people to go underground. (See *Morrison v. Anglo Deep Gold Mines, Ltd.*, 1905 T.S. 775 at 779.) Each case must be decided on the terms of the particular contract read in the light of the defendant's having to establish all three prerequisites of the *volenti* rule namely, not only a knowledge of the risk of the damage or injury actually suffered eventually, but also a realization thereof in the mind of the injured person plus a voluntary acceptance of such risk. Thus in *Cardboard Packing Utilities (Pty.) Ltd. v. Edblo Transvaal, Ltd.*, 1960 (3) S.A. 178 (W), where, in answer to a claim by a tenant for damage caused by fire to his property, the landlord set up as his defence a clause in the lease stipulating for his non-liability for 'damage caused by rain,

storm water, wind, hail, lightning, fire, action of the elements, or by reason of riots, strikes, the King's enemies, any act of God or *force majeure* or as a result of any other cause whatsoever' and here it was held (following *Canada Steamship Lines, Ltd. v. The King* [1952] A.C. at 208) that the said words, taken in their ordinary meaning, were not wide enough to cover negligence on the part of the landlord's servants. In *Hughes N.O. v. S.A. Fumigation Co. (Pty.) Ltd.*, 1961 (4) S.A. 799 (C), however, where a fumigation company had stipulated that the plaintiff owner of property, suspected of having beetle infestation, should take insurance against the risk of fire and specifically stipulated that 'no responsibility for fire damage, however remote, rests with the contractor', it was held that such clause was sufficient to exclude liability for negligence on the part of the contractor's servants. (See, also, *James Archdale & Co., Ltd. v. Comservics, Ltd.* [1954] 1 All E.R. 210.) In a contract of **bailement**, on the other hand, it is not sufficient for the warehouseman to rely on a monthly invoice, excluding liability for burglary, in the absence of evidence that such term had been brought to the notice of the plaintiff and that the bailee was liable for his negligence (*Frocks, Ltd. v. Dent & Goodwin (Pty.) Ltd.*, 1950 (2) S.A. 717 (C) at 724-5). This aspect of 'knowledge and consent', obtaining in contracts of deposit (e.g. motor vehicles at garages at the 'owner's risk' (cf. *Rosenthal v. Marks*, 1944 T.P.D. 172; *Weinberg v. Oliver*, 1943 A.D. 181, and *Essa v. Divaris*, 1947 (1) S.A. 753 (A.D.)) could usefully and in appropriate circumstances be considered in actions in delict.

Generally speaking, a notice exempting the defendant from liability cannot be relied upon if the contract has *already been made* before the plaintiff could see the notice (*Olley v. Marlborough Court* [1949] 2 K.B. 532 (C.A.) at 549), per Denning L.J.:

'Now people who rely on a contract to exempt themselves from liability must prove that contract strictly. Not only must the terms of the contract be clearly proved but also the intent to create legal relations—the intent to be legally bound—must also be clearly proved. The best way of proving it is by a written contract signed by the party to be bound. Another way is by handing him, before or at the time of the contract, a written notice specifying the terms and making it clear to him that the contract is on these terms. A prominent public notice which is plain for him to see when he makes the contract, or an express oral stipulation would, no doubt, have the same effect. But nothing short of one of these three ways will suffice.'

In *Adams v. Trust Houses* [1960] 1 Lloyd's Rep. 380 it was ruled that the more unreasonable the condition the more must be done to bring it to the notice of the other party and that an exempting notice on the wall of a garage had not sufficiently been brought to the plaintiff's attention.

Volenti withdrawn before injury

An assumption of risk may be withdrawn by a party if done timeously and before injury or damage has been suffered as is illustrated in the decision in *Stolzenberg v. Lurie*, 1959 (2) S.A. 67 (W). Here the plaintiff, in a motor vehicle, at first urged the defendant to hurry but later, after a drizzle began to fall, had requested the defendant to drive more slowly, which request the defendant failed to comply with, and it was decided that since plaintiff had neither invited nor urged the defendant to ignore

the hazards of the road the latter's defence of *volenti* failed. Nor did it make any difference that the plaintiff had, after the car had begun to skid, seized the steering wheel in an endeavour to avoid imminent peril (*ibid.*, at 74).

Servant protesting but continuing

It was assumed in English law that a workman assumes the patent risks arising from the nature of his particular employment, e.g. a shunter injured while uncoupling trucks (*Canadian Pacific Railway v. Fredhette* [1933] 2 K.B. 297), but the more modern view is that it is not *scienti* but *volenti* which bars his remedy (*Thomas v. Quartermaine* (1887) 18 Q.B.D. 685 (C.A.) at 696 and *Smith v. Baker & Sons* [1891] A.C. 325 (H.L.)). Today it applies only if the work necessarily involves a danger (*Bowater v. Rowley Regis B.C.* [1944] 1 All E.R. 465 (K.B.)).

Where a risk arises, not from the very nature of the occupation, but only incidentally, the fact that a servant, sooner than lose his employment, has continued in the service notwithstanding the risk, will not constitute consent. As Peckius has it, '*Interdum scienti fit injuria, sed reclamanti et protestanti; interdum fit scienti, tacenti et ferenti, sed non consentienti; interdum consentienti sed non vere intelligenti et quid agat scienti*'. So in *Baker v. James* [1921] 2 K.B. 674, a commercial traveller injured by a defect in a car against which he had protested was held entitled to recover damages; and in *Tee v. Mcllwraith*, 19 E.D.C. 282, a tenant, injured by defective premises against which he had protested, was granted redress. Consequently where the plaintiff was directed by the Minister of Labour and National Service to work in defendant's factory where high-explosive shells were being produced, it was ruled that the doctrine of *volenti non fit injuria* did not apply seeing that the plaintiff was employed against her will when she was injured by an exploding shell (*Norah Read v. J. Lyons & Co.* [1944] 2 All E.R. 98). See also *Smith v. Baker* (*supra*); *Bowater v. Rowley Regis B.C.* [1944] K.B. at 480, and Glanville Williams, pp. 300-2.

Risk accepted to save a stranger

It has been observed that there is no *volenti* where a person acts, upon the call of duty, to intervene for the purpose of saving a third person from harm (*ante*, p. 35) and this would also apply to a person acting in a protective relationship such as a parent and child and, although in criminal law no liability would be attracted to a person actuated by a sense of moral duty in the protection of a stranger (Gardiner and Lansdown, p. 113) it is doubtful whether the *volenti* doctrine would be excluded in the case of a stranger in the law of delict, since a man is under no positive duty to shield a stranger (*Donoghue v. Stevenson* [1932] A.C. 562) and if he does do so he is assuming a patent risk on his own account (*Cutler v. United Dairies* [1933] 2 K.B. 297). It is submitted, however, that if the acts of a person are such that he ought to have foreseen that some third party would intervene in order to save a stranger threatened with harm, he will be liable in damages for an injury suffered by the latter in endeavouring to save such stranger, provided the acts of the intervener are reasonable in the circumstances. Accordingly the *volenti* doctrine would not apply. (See *ante*, p. 36.)

Acting under plaintiff's directions or instructions

A man may be said to have 'assumed the risk' where the defendant has been acting specifically under his instructions or directions, as for instance directing the defendant in the manner and means of reversing a car out of a garage (*Yankelowitz v. Vavruska*, 1965 (3) S.A. 550 (C) at 551). Per Tebbutt A.J.:

'Where a person requests or instructs another to perform a duty which is potentially dangerous to the former's person or property and stipulates that the person performing it must do so strictly in accordance with his directions and instructions, he cannot be permitted to complain or hold the performer liable if the latter, while carrying out those directions or instructions to the best of his ability and with reasonable care, nevertheless causes damage to the former's person or property.'

There is however a rider to this proposition, namely, that if the performer knows that the directions or instructions are likely to result in his causing such damage, then it may be that he should not continue to follow such directions or instructions.

Breach of statutory duty

If a servant accepts the risk consequent on the breach by his employer of an express statutory duty, can he recover resultant damage? For England, the answer is in the affirmative. In *Wheeler v. New Merton Board Mills* [1933] 2 K.B. 669, the Court of Appeal felt itself unable to overrule *Baddeley v. Earl Granville*, 19 Q.B.D. 423, because it had stood for fifty years. Scrutton L.J. said he would feel happier if he could understand the grounds on which that case was decided; Greer L.J. intimated clearly that if it had not stood for so long he would have overruled it. Once it is established (as it is now in England, see *Flower v. Ebbw Vale Co.* [1936] A.C. 206) that contributory negligence is a partial defence to an action founded on a breach of statute, it is difficult to defend the opposite rule for the defence of *volenti*, though a distinction *can* be drawn (see the judgment of Slessor L.J. in *Wheeler's* case, *supra*). In South Africa, the question was raised but expressly left open in *Thomson v. Everitt*, 1921 E.D.L. 9. The observations of Matthaeus (l.c., *supra*) go to support the view that consent to the disregard of a statutory duty will bar an action for damages (though not, of course, a criminal prosecution) and the same view was taken by Innes C.J. in *Morrison v. Anglo Deep Gold Mines, Ltd.*, 1905 T.S. 775 at 781-2. It is submitted that, with the legislative amendment of our law on contributory negligence, however, our courts will not now follow this rule, but will order an apportionment of damages depending on the degree of the workman's negligence (*Cakebread v. Hopping Bros., Ltd.* [1947] 1 All E.R. 389 (C.A.)). No doubt the fact that a duty is statutory may affect the question whether there was *full consent*, i.e. knowledge plus appreciation plus consent; it may be necessary to show that the plaintiff knew of the terms of the statutory duty and thereafter waived his rights thereunder (see Beven, 4th ed., p. 801).

A servant, who falls within the definition of 'workman' under the Workmen's Compensation Act, is protected (up to certain limits) in respect of all injuries suffered by him during the course of his employment. He is also entitled to sue, by virtue of the Motor Vehicle Insurance

Act, section 11, for such **shock, pain and suffering** where his employer (e.g. the State) is not insured with a registered company (*Bhoer v. Union Government*, 1956 (3) S.A. 587 (C)). He can also sue the insurer for the difference between his actual loss or damage and the amount he is entitled to under the Workmen's Compensation Act where his actual loss exceeds the compensation he is entitled to under that Act (*Workmen's Compensation Commissioner v. Norwich Union Fire Insurance Society*, 1953 (2) S.A. 546 (A.D.)). But, if he does do so, it seems that the aforementioned considerations relating to *volenti*, and also an apportionment of damages in respect of his own fault, would apply.

Volenti in action by dependants

In an action by dependants for damage resulting from the killing of the *paterfamilias*, is it a good defence that the latter had voluntarily accepted the risk? Contributory negligence of the deceased is no defence (*Union Govt. v. Lee*, 1927 A.D. 222, and see *post*, p. 270); nor is the fact that the deceased by contract excluded liability to himself (*Jameson's Minors v. C.S.A.R.*, 1908 T.S. 575), nor the circumstance that, after the injury, the deceased in his lifetime accepted a sum from the wrongdoer in full settlement (*Ex parte Oliphant*, 1940 C.P.D. 537). Considerable doubt has arisen as to whether the signing of an indemnity assuming all risk by the deceased, in favour of a stipulator, would deprive the former's dependants of their rights of action for damages owing to the negligence of the stipulator (see McKerron, pp. 67-70, and (1936) 53 *S.A.L.J.* 413), the view being taken that such assumption of risk may be either (a) a mere undertaking by the deceased not to sue for his own personal damages (although there is still a duty upon the part of the stipulator to take care), or (b) that the pact relieves him from taking any care at all, in which case the dependant's claim for damages would be defeated.

It is submitted that the correct position is as set out in (a) above and not as in (b), namely that, while a person can forfeit his right to sue for damages for negligence by a contract of an assumption of risk, he cannot thereby bind third parties thereto, i.e. his dependants who, despite such pact of *volenti*, will still be entitled to sue a negligent stipulator for damages resulting from the death of their breadwinner. This must clearly be so having regard to the following considerations:

1. The decisions in *Jameson's Minors v. C.S.A.R.*, 1908 T.S. 575, and *Munarin v. Peri-Urban Areas Health Board*, 1965 (1) S.A. (W) at 552 and 1965 (3) S.A. 367 (A.D.), do not support the view that the deceased's dependants are rendered remediless. Such contract merely bars the deceased's rights to sue and does not relieve the stipulator of his duty to take care (*Jameson's* case at 589 and *Munarin's* case at 552).
2. In effect the deceased's indemnity is tantamount to a waiver of his own rights to sue: he can only waive his own personal rights and not those of third persons.
3. To his dependants he is under a legal obligation to support them as long as is necessary and such obligation cannot, by a *res inter alios acta*, be waived save with the consent of such obligees.

4. In any case, before such claim of waiver can be upheld, it must be shown by the stipulator that (a) the deceased had full knowledge of his rights and (b) he had decided to abandon them (*Moyce v. Est. Taylor*, 1948 (3) S.A. 822 (A.D.) at 830; *Laws v. Rutherford*, 1924 A.D. at 263; *Margate Estates, Ltd. v. Urtel (Pty.) Ltd.*, 1965 (1) S.A. 279 (N)), i.e. that he agreed to take the risk of the actual injury he, in fact, suffered. Moreover, in certain cases, an excusable ignorance of law can defeat the claim of waiver (*Van der Merwe v. Die Meester*, 1967 (2) S.A. 714 (S.W.)).
5. The courts have in many cases, for reasons of public policy, steadfastly refused to uphold the defence of consent to the infliction of bodily injury 'save for just cause or excuse' (see Denning L.J. in *Bravery v. Bravery* [1954] 3 All E.R. 59 (C.A.) at 67 (consent by wife to husband's sterilization), and criminal cases such as *R. v. Matomana*, 1938 E.D.L. 128 (risk of injury by playing with sticks—no consent and verdict of culpable homicide); *R. v. McKoy*, 1953 (2) S.A. 4 (S.R.) (air hostess consenting to a caning for a breach of regulations) and *S. v. Sikunyana and others*, 1961 (3) S.A. 549 (E) (consent to the infliction of burns to exorcize evil spirits)). If the courts refuse to exculpate an accused, on the grounds of the complainant's consent in such cases, it would be illogical to assume that they will, on the one hand, apply the penal sanctions of the law but would in a civil trial, on the other hand, uphold the defence of consent to the infliction of personal injuries on the deceased in favour of a defendant when sued by his dependants. If the law adopts a more humane or liberal attitude in criminal law than it does in civil cases (e.g. the defence of a reasonable mistake will excuse liability in a criminal trial, but is no excuse in a civil trial (*Cohen Lazer & Co. v. Gibbs*, 1922 T.P.D. at 145; *Birch v. Ring*, 1914 T.P.D. 106)) why should it not apply, at least, a similar test when the defence of consent is set up in a civil action?
6. A parent as legal guardian can make a contract binding on his minor child only if it is for the benefit of the child (*Van der Byl v. Solomon*, 1877 Buch. 25). A contract of *volenti*, which would bar the child's normal rights for damages for the loss of his father's maintenance of him, would certainly not be for his benefit and would be voidable upon the minor's attaining majority (Grotius 3.48.11; Voet 4.4.13). How, in the face of this principle, can it be said that an assumption of risk by the parent is binding on the dependant child?

As to the duty to take due care, despite a voluntary assumption of risk, see *S.A.R. & H. v. Cruywagen*, 1938 C.P.D. 219 at 235; *De Vaal N.O. v. Messing*, 1938 T.P.D. 34 at 39; *Yarmouth v. France* (1887) 19 Q.B.D. 647 at 656-7.

It is, accordingly, submitted that, since the parties are at arm's length when the assumption of risk agreement is sought to be entered into, the stipulator is quite free to decline to enter into any joint enterprise or undertaking involving risk unless and until he also obtains an indemnity against an action for damages from the latter's dependants themselves. In regard to public conveyances, where such precautionary measures would

be unduly onerous, it is submitted that the position should receive the attention of the legislature, as suggested by Innes C.J. in *Jameson's Minors v. C.S.A.R.* (*supra*) at 590.

Illustrative cases

Volenti applied

Spires v. Scheepers, 3 E.D.C. 173: A farm labourer with express notice of dangerous ostriches, was held not entitled to recover damages for injury caused by one of them.

Agricultural Co-op. Union v. Constable, 1921 N.P.D. 332: Employee, having been expressly warned of the danger from collapse of wall, stood too close and was injured. Held, he was not entitled to redress.

Middelburg Municipality v. Schoombie, 1920 T.P.D. 227: Plaintiff, in allowing cow to be dragged into dipping-tank, was ruled not entitled to recover damage for its consequent death.

McMorrow v. Colonial Govt., 23 S.C. 626: Attendant in mental asylum was held not entitled to recover damages for injuries inflicted by a patient not known to be dangerous. 'A person who undertakes the employment must know that he may be exposed to sudden attacks of this nature; it is in the nature of the occupation.'

Burnett & Taylor v. De Beers, 8 H.C.G. 5: Plaintiffs, in working claims which they knew were overhung by defendants, without giving notice or calling on defendants to remedy, were held to be not entitled to damages.

Stern v. Pobrey, 1947 (1) S.A. 350 (C) at 359: There might be *volenti* for pickets, during a strike, to obstruct the passage of a motor vehicle coming from the workers' place of occupation, if they deliberately remain standing in the driver's way and refuse to heed his hooter and warning shouts to get out of the way, but the defence should be specially pleaded and the matter fully investigated. Held that they were guilty of contributory negligence.

Murray v. Harringay Arena [1951] 2 K.B. 529: Damage suffered in a game of ice hockey.

No consent to accept risk

Slater v. Clay Cross Co., Ltd. [1956] 2 All E.R. 625 (C.A.): There is no assumption of risk, within the meaning of the *volenti* rule for a person to use defendant's railway tunnel, and thereby incur damage by being run over, but there is certainly contributory negligence.

Netherlands Insurance Co. v. Van der Vyver, 1968 (1) S.A. 412 (A.D.): To jump on o the bonnet of a moving car in order to stop the driver thereof from proceeding further.

Mandelbaum v. Bekker, 1927 C.P.D. 375: Injury suffered by plaintiff in a sham fight held by the Defence Force, due to one of the opposing parties firing a blank cartridge into his face, cannot be met by the *volenti* defence, since the plaintiff was compelled to participate in the fight under the Defence Act.

Bravery v. Bravery [1954] 3 All E.R. 59 (C.A.) at 67F: To consent to a surgical operation, without any just cause therefor, i.e. sterilization.

Dauids v. Mendelsohn, 15 S.C. 367: A landlord gave lessee notice to vacate so that a roof could be repaired, but the lessee refused to vacate. Held, that the lessee was not entitled to damages for injury received in the course of the repairs. Contrast *Tee v. McIlwraith*, 19 E.D.C. 282, where the lessee, who complained of a defect (slippery yard) but continued to occupy the house, was awarded damages, cf. *Baker v. James* [1921] 2 K.B. 674, where an employee complained of a defect in a car making it dangerous to start by hand, but continued to drive it; the Court decided that he had never consented to the risk and was entitled to damages.

Waring & Gillow v. Sherborne, 1904 T.S. 340: A workman was injured by climbing on defective staging. As neither knowledge nor consent were proved, it was decided that he was entitled to damages. Compare *Union Govt. v. Mathee*, 1917 A.D. 688, where a workman was unloading timber negligently stacked, with an overhang. He

knew that the overhang was dangerous in itself, but had taken precautions to obviate it, and had no knowledge of other factors of danger. Held, he was entitled to recover.

Thomson v. Everitt, 1921 E.D.L. 9: A workman, working with petrol and using an electric fan, had no knowledge that the fan was apt to emit sparks. Held, he was entitled to damages consequent on explosion.

Mandelbaum v. Bekker, 1927 C.P.D. 375: Plaintiff was acting under military orders in a sham fight and was injured by having a rifle loaded with a blank cartridge discharged in his face at close range. Held, he was entitled to damages. Per Watermeyer J.: 'The sham fight was likened to a football match. In a football match the player naturally submits himself to the ordinary assaults which must take place, but he does not submit to anything more; and in a sham fight the man on the one side submits only to the ordinary risks of a sham fight; to those risks which are incidental to a sham fight ordinarily conducted without negligence. If one of the enemy caused him, the plaintiff, damage by a negligent act, that was not the ordinary risk; he was not submitting to that; and the enemy is liable.'

Coombs v. Mason, 1931 N.P.D. 105: Even if a municipal regulation prohibiting 'vehicles' from travelling in a certain direction in a certain street applies to rickshas, a passenger, who so travels in one and is injured, is not debarred if it is not proved that he knew of the prohibition and appreciated the risk of disobeying it. (*Obiter*, regulation held not to apply.)

7. CONTRIBUTORY NEGLIGENCE

OWN FAULT

'*Quod quisque ex sua culpa damnum sentit, non intelligitur damnum sentire*'—I cannot complain of damage which I bring upon myself by my own fault (D.50.17.203) (*National Meat Suppliers v. Cape Town C.C.*, 1938 C.P.D. at 504). This was the doctrine of contributory negligence which is or was fully recognized in Roman law and which has been recognized by all developed systems of law. It became known, inaccurately but conveniently, as the doctrine of 'Contributory Negligence'. Inaccurately, because *culpa*, strictly speaking, is the breach of a duty owed to another; and one cannot strictly be said to owe to others a duty to preserve one's own person or property. Conveniently, because the principles applied in determining whether a plaintiff has by his own fault disabled himself from recovering damages are the same principles as are applied in determining whether the defendant has been guilty of negligence towards the plaintiff. See *Jordaan v. C.S.A.R.*, 1909 T.S. at 476, and *Lewis v. Denye* [1939] 1 K.B. 540. For a discussion of this topic see Glanville Williams, *Contributory Negligence*, pp. 86–7.

HISTORICAL

The *Digest* provides several examples of its application to the action under the *lex Aquilia* (D.9.2.9.4, 11 pr., 28, 31). In fact Ulpian (in D.9.2.28.1) expresses it in a form exactly embodying the language of the modern authorities: '*Et multa hujusmodi deprehenduntur quibus submovetur petitor, si evitare periculum poterit*': 'if he could have avoided the harm.' But the *development* of the doctrine is the work, and the comparatively recent work of the courts, principally of the English courts, whose decisions in this department of the law have always been accepted in South Africa as of very great persuasive authority. The phrase '*culpa-compensation*' used by Grueber in his Commentary on the *lex Aquilia*, whatever it might have meant to the Roman lawyer, did not obtain in modern law, for there is no 'cancelling-out' of the negligence of one party by the negligence of

the other, in any proper analogy with the law of compensation of debts. See, however, the remarks of Gardiner A.J.A. in *Union Govt. v. Lee*, 1927 A.D. 202 at 227-8.

The effect of the development of the principle was that a party could not complain of an injury done to him if the damage he suffered was due either in whole or in part to his own negligence, and while the courts sought to temper the wind for the careless plaintiff and to mitigate the harshness of the rule where he was only slightly negligent by the application of such principles as the 'last opportunity' rule and the 'proximate cause' rule and the 'moral blameworthiness' rule (see *Pierce v. Hau Mon*, 1944 A.D. at 196; *British Columbia Electric Railway Co. v. Loach* [1916] A.C. 719; *Van der Walt v. Gershalter*, 1944 T.P.D. 240; *Cooper v. Armstrong*, 1939 O.P.D. 147), it was nevertheless felt that the general application of the 'all or nothing' principle was not in conformity with modern ideas of equity and justice (see Watermeyer J.A. in *Hau Mon's* case (*supra*) at 198, and Aquarius, 'Causation and Legal Responsibility' (1945) 62 *S.A.L.J.* 141). (See *Keevy v. Dias*, 1965 (4) S.A. 106 (S.R.)) Indeed the application of the rule sometimes enabled a plaintiff who was really guilty of greater negligence than the defendant to recover where he could show that his negligence had ceased before the culmination of the incidents leading to the damage complained of.

APPORTIONMENT OF DAMAGES ACT, NO. 34 OF 1956

In order to obviate and exclude the unfairness often resulting from the 'all or nothing' principle inherent in the Contributory Negligence rule the legislatures of both the United Kingdom and South Africa (but not Rhodesia) have enacted statutes effecting an apportionment of damages according to the degrees of negligence of which both, or one or other of the contending parties were guilty in respect of the damage complained of. Accordingly it has been held by Broome J.P. in *Shange v. S.A.R. & H.*, 1957 (4) S.A. 696 (N) at 698, that such considerations as 'last opportunity', 'proximate cause' and 'decisive cause' are no longer applicable. This decision has found an echo in *Van der Merwe v. Fourie*, 1959 (3) S.A. 568 (E), and *Saitowitz v. Provincial Insurance Co., Ltd.*, 1962 (3) S.A. 443 (W) at 446. A careful reading of these decisions however does not justify the assumption that the 'last opportunity' principle must be excluded altogether from consideration in determining the degree of fault of a party, but merely that it is no longer applicable when sought to be set up as a complete defence of no liability at all. To take a hypothetical case: if A buys sugar from B and B's servant, in error, sends A a packet of poison and B thereafter, upon discovering the error, immediately telephones A warning him of the danger and instructing him to return the parcel, the fact that A, having the last opportunity, is negligent in failing to heed such warning and request, but despite it makes use of the consignment, it would be absurd to say that A's negligence should not be considered by the court at all in determining the relative degree of fault of the parties.

Section 1 of the Act reads as follows:

'1(1)(a). When any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage

shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.'

Exclusions

The Act does not, however, apply to the following cases:

- (a) to collisions or *accidents at sea* (section 4(2)); or
- (b) to increase the amount of damages *beyond any maximum prescribed* in any *agreement* or by *law* applicable in respect of any claim for damages (section 4(1)(c)); or
- (c) to claims for increased compensation under section 43 of the Workmen's Compensation Act, No. 30 of 1941, since what a workman may claim is 'compensation' and not 'damages' (*Grace v. W.C.C.*, 1967 (4) S.A. 137 (T); *Table Bay Stevedores (Pty.) Ltd. v. S.A.R. & H.*, 1959 (1) S.A. 386 (A.D.) at 390); or
- (d) to the *wife* of a party who is regarded as a third person to the suit (*Kleinhans v. African Guarantee & Indemnity Co.*, 1959 (2) S.A. 619 (E) at 627), but this does not exclude the wife who is the driver of the car in which her husband is a passenger (*Van Zyl v. Gracie*, 1964 (2) S.A. 434 (T)); or
- (e) to a *minor child* of a party in respect of the child's medical expenses (*Nieuwenhuizen N.O. v. Union and National Ins. Co., Ltd.*, 1962 (1) S.A. 760 (W) at 763; *Saitowitz v. Provincial Insurance Co., Ltd.*, 1962 (3) 443 (W)); (1965) 82 S.A.L.J. 391 and 551); or
- (f) to actions for damages not *depending on 'fault'* (section 1(1)(a) and *Barclays Bank v. Straw*, 1965 (2) S.A. 93 (O)). Here the plaintiff sued, not for damages, but for 'compensation'.

Analysis

It will be seen that the Act does not provide a complete defence, but only a partial one, in enabling the defendant to reduce the plaintiff's damages owing to the latter's own 'fault', as to which the court may deem it just and equitable (*Van Oudtshoorn v. Northern Assurance Co.*, 1963 (2) S.A. 642 (A.D.) at 648). Although the section refers only to the 'claimant' it is clear that what the court has to measure is the conduct of all the parties whose fault caused the damage (*South British Insurance Co., Ltd. v. Smit*, 1962 (3) S.A. 826 (A.D.) at 835H).

The very nature of the inquiry into apportionment imports a considerable measure of individual judgment upon which various judicial officers, approaching the matter in a perfectly bona fide way, must come to differing results (*Prinsloo v. Giradin*, 1962 (4) S.A. 391 (T) at 394, and *Smit's case (supra)* at 837). In the latter case Ogilvie Thomson A.J. cited with approval the dictum of Lord Wright in *British Frame (Owners) v. McGregor (Owners)* [1943] 1 All E.R. 33 (H.L.) at 35 to the effect that:

'It is a question of the degree of fault, depending on trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle but of proportion,

of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be difference of opinion by different minds.'

He added that the appeal court will not, therefore, readily interfere with the decision of the trial court save where there has been an *error in principle*, as in *Frodsham v. Aetna Insurance Co.*, 1959 (2) S.A. 271 (A.D.). See, also, *Bonheim v. South British Insurance Co., Ltd.*, 1962 (3) S.A. 259 (A.D.), in this respect.

English Decisions

Since the Law Reform (Contributory Negligence) Act of 1945 in England differs materially from the wording of the South African Act, No. 34 of 1956, it would be unsafe to apply the judicial decisions of the English judges without careful consideration. In any case the language employed by the legislature, in the latter Act, is far from perfect (*vide* the dictum of Holmes J. in *Taylor v. S.A.R. & H.*, 1958 (1) S.A. 139 (D) at 142), where he said: 'And so it is a little disappointing to find that after all the lawgiver, with two and possibly three official languages at its disposal, has not expressed itself in words so simple and clear that he who runs may read.' See also McKerron in (1968) 85 *S.A.L.J.* at 15 where the history of the Act, and the appropriate methods of amendment are suggested, in order to bring the statute more into line with the requirements and intentions of the legislature, are set out.

'Fault'

It is remarkable that the legislature, in defining the word 'fault', merely says that 'It includes any act or omission which would, but for the provisions of this section, have given rise to the defence of contributory negligence'. It is submitted, however, that, although the word 'includes' is not exhaustive and may be regarded as a general term of extension to include other considerations or factors (see *Torf's Est. v. M. of Finance*, 1948 (2) S.A. 283 (N) at 289-90; *Jones & Co. v. C.I.R.*, 1926 C.P.D. 1; *Rosen v. Rand Townships Registrar*, 1939 W.L.D. 5; *R. v. Ah Tong*, 1919 A.D. 186; *Dilworth v. Comm. of Stamps* [1899] A.C. at 105, and *R. v. Debele*, 1956 (4) S.A. 570 (A.D.) at 575), in the context of this enactment, it refers only to negligence and that apportionment cannot be applied against the plaintiff where he has suffered damage or injury in consequence of a malicious or intentional act by the defendant.

It has been contended that the Act would also not apply to the *actio de pauperie* (McKerron at 270), but since the defendant is entitled to rely on the negligence of the plaintiff, as a defence, it is submitted that the plaintiff's claim would be liable to apportionment (see *post*, p. 161).

Negligence (Contributory)

By employing the word 'fault' it is manifest that the lawgiver intended a wider concept of *culpa* than is implicit in the connotation of Negligence as defined *ante*, p. 8, which depends upon a failure to take care in respect of another person. Under Act 34 of 1956 'fault' is not limited to such duty to another person but would also include a failure by an actor to use reasonable care for the safety of *himself or his property* so that he becomes

the author of his own wrong (*Charlesworth on Negligence*, 3rd ed. at 507-8; *Van Niekerk v. Labuschagne*, 1959 (3) S.A. 562 (E) at 564). For example, a pedestrian stepping off a pavement without looking would, primarily, be breaching a duty owed to himself. (See Lord Simon in *Nance v. British Columbia Electric Railway Co., Ltd.* [1951] 2 All E.R. 448 (P.C.) at 450, where he said:

'But when contributory negligence is set up as a defence its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such defence is to prove to the satisfaction of the jury that the injured party did not, in his own interest, take reasonable care of himself and contributed, by this want of care, to his own injury.'

Volenti?

It may be that the legislature, in using the word 'fault', had in view the position where the principle *volenti non fit injuria* applies, but the answer to this is that *volenti* is not a fault—it implies a deliberate choice (see *ante*, p. 59), although there may be occasions where *volenti* and negligence overlap as where a person, knowing of the drunken state of the driver, nevertheless assumes the risk of entering his car as a passenger (*Lampert v. Hefer*, 1955 (2) S.A. 507 (A.D.)). (See *ante*, p. 57.)

Causation—Blameworthiness?

In *South British Insurance Co. v. Smit*, 1962 (3) S.A. 826 (A.D.) at 833-4, Ogilvie Thompson J.A. refers to the dispute as to the meaning of section 1 of the Act and to the lack of uniformity in various judgments. One view is that the relative degree of 'blameworthiness' must be the sole criterion and this has support in the judgment of Schreiner A.C.J. in *Frodsham v. Aetna Insurance Co.*, 1959 (2) S.A. 271 (A.D.) at 281, where he said that:

'once there is negligence on both sides without which the damage would not have happened, the enquiry as to causation drops into the background and an investigation into the blameworthiness takes its place.'

This was followed in *Bhyat's Store v. Van Rooyen*, 1961 (4) S.A. 59 (T) at 65. Other writers and decisions contend, however, that the criterion of 'causative effect', rather than blameworthiness, was the true one.

The conclusion reached by the learned Judge in *Smit's* case (at 836) is that it is wrong to say that causation has nothing to do with the apportionment of damages, nor does the section anywhere speak of 'blameworthiness'. He then continues:

'In directing the court to have "regard to the degree in which the claimant was at fault in relation to the damage" . . . the legislature, in my opinion requires the court to assess the *degree of the claimant's negligence in relation to the damage* which has been caused by the combination of that negligence and the negligence of the defendant. That is not to say that the court is to embark on the impossible task of determining the degrees of causation. What the court is required to do is to determine, having regard to the circumstances of the particular case, the *respective degrees of negligence* of the parties. In assessing the degree in which the claimant was at fault in relation to "the damage" the court must determine in how far the claimant's acts or omissions, causally linked with damage in issue, deviated from the norm of the *bonus paterfamilias*. In thus assessing the position, the court will,

as explained above, determine the respective degrees of negligence, as reflected by the acts and omissions of the parties, which have together combined to bring about the damage in issue.'

Assessment

This dictum was followed in *Jones v. S.A.N.T.A.M., Bpk.*, 1965 (2) S.A. 542 (A.D.) at 544. Here Williamson J.A. said that a method adopted by some judges is to express the extent of a party's deviation in conduct from the norm of a *bonus paterfamilias* in the form of a percentage, for example *slight* negligence might be expressed say as 10 to 25 per cent deviation; *substantial* negligence in the neighbourhood of a 50 per cent deviation; a *gross* or a *very serious* deviation would be from a 75 to 100 per cent deviation from the norm. See also *Woods v. Adm. Transvaal*, 1960 (1) S.A. 311 (T) at 315.

Although the statute does not say that the damage suffered is to be reduced proportionately to the relative degrees of gravity of negligence attributable to the parties, it is nevertheless necessary to compare those degrees in order to arrive at what is just and equitable in the circumstances; per Roper A.J. in *Selikman v. London Assurance*, 1959 (1) S.A. 523 (W) at 528. If the plaintiff is solely responsible for the injury suffered by him, the defendant's liability is excluded completely (*Manwaring v. Billington* [1952] 2 All E.R. 747 (C.A.)). From this it follows that if the defendant is solely responsible, the plaintiff must be awarded his full claim for damages. This would also apply where the causative potency is so slight as to be discarded under the *de minimis non curat lex* principle (*Celliers v. S.A.R. & H.*, 1961 (2) S.A. 131 (T) at 141).

Practice—Pleadings

The court is not bound by the strict letter of the pleadings and, even when neither plaintiff nor the counterclaiming defendant claim an apportionment, the court is nevertheless entitled to apportion damages appropriately (*Logiotis v. Van Eyk*, 1968 (3) S.A. 429 (E)). See also *post*, p. 514.

Apportionment

Neither the English nor the South African Acts mention the word 'apportionment', yet it seems clear that this was the intention of the legislature. If the plaintiff sustains, say, R100 damages in a car collision and defendant sustains damages in the sum of R500 and counterclaims therefor, it seems that, if the court finds that they are both equally guilty, i.e. 50/50 per cent, it will award R50 to the plaintiff on his claim and R250 to the defendant on his counterclaim. In other words defendant receives R200 net. On the same basis if plaintiff is one-quarter responsible, on account of his contributory negligence, he will be awarded R75 and the defendant R125 on his counterclaim, thereby conceding defendant R50 net on the outcome of the proceedings (see *Kelly v. Stockport Corpn.* [1949] 1 All E.R. 893 (C.A.); *Stapley v. Gypsum Mines, Ltd.* [1953] 2 All E.R. 478 (C.A.), and Glanville Williams, secs. 99, 122).

The subject has been dealt with by McKerron in his *Apportionment of Damages*, pp. 1–20, and Glanville Williams, *Joint Torts and Contributory Negligence*, secs. 98–117.

COSTS

Discretion

The courts have been far from unanimous in regard to the award of costs to one party or the other after an apportionment of damages has been decreed. Basically an award as to costs is in the discretion of the court and a court of appeal is reluctant to interfere with such discretion in the absence of the application of a wrong principle by the trial court (*Cronje v. Pelser*, 1967 (2) S.A. 589 (A.D.)), or when damages have been wrongly apportioned (cf. *Bell v. M. of Economic Affairs*, 1966 (1) S.A. 251 (N) at 258) or where the award is one which a reasonable man could not have made (*Merber v. Merber*, 1948 (1) S.A. 446 (A.D.) at 453; *Rubin on Costs*, pp. 21–3). The general rule is that where there is no counterclaim costs should be awarded to the plaintiff who succeeds in recovering a ‘substantial portion’ of his claim (*Pelzer v. Levy*, 1905 T.S. at 469; *Haywood v. Cohen*, 1947 (4) S.A. 19 (T) at 23–4) always having regard to the principle that the ‘court has ample discretion to make any order as to costs which in its opinion the equities of justice of the case require’ (per Innes C.J. in *Hulscher v. Voorschootkas voor Zuid Afrika*, 1908 T.S. 542 at 551; *Cinema Press, Ltd. v. Pictures & Pleasures, Ltd.* [1945] 1 All E.R. 440 (C.A.) at 444).

Possible awards in counterclaims

Various criteria have been observed in making awards in cases where the court finds that the plaintiff has succeeded partially in his claim and the defendant has materially substantiated his counterclaim, such as:

- (a) To award costs to the successful plaintiff in convention and costs on the counterclaim to the successful plaintiff in reconvention (*Botha v. African Bitumen Emulsion (Pty.) Ltd.*, 1960 (2) S.A. 6 (T); *Ihlenfeldt v. Rieseberg*, 1960 (2) S.A. 455 (T)).
- (b) To make *no award* as to costs, when defendant has succeeded in equal degree with the plaintiff on the sole issue adjudicated upon, i.e. the responsibility for the collision (*Basson v. Pietersen*, 1960 (1) S.A. 837 (C); *Smith v. W. H. Smith & Sons, Ltd.* [1952] 1 All E.R. 528 (C.A.) at 530; *Glatt v. Evans*, 1962 (3) S.A. 959 (T)).
- (c) To apportion costs between the successful parties in inverse proportion to their respective degrees of blameworthiness (*Stolp v. Du Plessis*, 1960 (2) S.A. 661 (T) at 664; *Venter v. Dickson*, 1965 (4) S.A. 22 (E) at 28).
- (d) To award costs to the litigant who has secured a *balance of damages* in his favour (*Bhyat's Store v. Van Rooyen*, 1961 (4) S.A. 59 (T)). This decision has been heavily criticized by both Boberg and Hoppenstein in their extensive researches and cogent arguments in (1962) 79 *S.A.L.J.* at 141 and 171, but was nevertheless followed by Harcourt J. in *General Tyre & Rubber Co. v. Kleynhans and another*, 1963 (1) S.A. 533 (N) at 538, who stated, however, that he did not agree with the statements in *Bhyat's* case that the moral factors should not be taken into account or that it was undesirable that the degree of fault should be taken into account twice, firstly in regard to apportionment and then in regard to costs (at 537). The ‘balance result’ principle

has also been applied in *Prinsloo v. Giradin*, 1962 (4) S.A. 391 (T) at 394, in *Basson v. Pietersen*, 1960 (1) S.A. 837 (C), and in *Bell v. M. of Economic Affairs*, 1966 (1) S.A. 251 (N) at 258. This, it is respectfully submitted, is a conclusion which is unreasonable and unfair and is quite out of keeping with the spirit of the Apportionment of Damages Act and can result in grave injustice. For example A sues B for R100 damages to his car and B counterclaims for R1,000 for damages to his car: The court holds that damages should be apportioned on the basis of 10 per cent negligence on the part of A and 90 per cent fault on the part of B with the result that A is awarded R90 and B gets R100 but, notwithstanding the slight carelessness of A and the gross negligence of B, A will have to pay all the costs of the trial. It was accordingly held in *Venter v. Dickson (supra)* that the principle followed in *Stolp v. Du Plessis* was preferable to that set out in *Bhyat's Store v. Van Rooyen*, Munnik J. here remarking that the decision in the latter case is 'neither justified in principle nor in accordance with the dictates of fairness'. In this regard, it should be noted that the Court of Appeal in *Slomovitz v. Uncini*, 1963 (1) S.A. 475 (T), refused to interfere with the magistrate's decision in ordering the plaintiff to pay all the costs of the action where he had found that the plaintiff was 75 per cent to blame and the defendant 25 per cent to blame, although the balance of damages was in the plaintiff's favour. See, also, *Botha v. African Bitumen Emulsion (Pty.) Ltd.*, 1960 (2) S.A. 6 (T).

Glanville Williams, *Joint Torts and Contributory Negligence*, section 136, at p. 451, says that costs should not be awarded 'merely on the basis of the net judgment' and, at p. 492, favours the principle that costs should be awarded to each party in the same proportion as to his loss. Moreover the many decisions cited by Boberg (*supra*, at 154-6) are ample authority for the conclusion that each party (i.e. plaintiff and defendant) should be awarded his costs to the extent to which he has been successful and this principle is in accord with the English decisions on contributory negligence such as *Stooke v. Taylor* (1880) 5 Q.B.D. 569; *Provincial Bill Posting Co. v. Low-Moor Iron Co.* [1909] 2 K.B. 344 (C.A.); *Chell Engineering, Ltd. v. Unit Tool & Engineering Co., Ltd.* [1950] 1 All E.R. 378 (C.A.); *Childs v. Blacker* [1954] 2 All E.R. 243 (C.A.); *Hanak v. Green* [1958] 2 All E.R. 141 (C.A.) and *Baylis Baxter, Ltd. v. Sabbath* [1958] 2 All E.R. 209 (C.A.).

As regards the argument that the 'balance award' principle would avoid double taxation, it is submitted that this convenience is too high a price to pay for the saving of a taxation of costs of the two opposing parties.

The matter again came up for decision in *Pretorius v. Herbert*, 1966 (3) S.A. 298 (T), when both the decisions in *Bhyat's Store (supra)* and *Venter v. Dickson (supra)* came up for consideration and decision. Here Trollip J. said (at 301) after referring to the unreported case of *Dada v. Fourie*, T.P.D. 15/6/1964:

'That case [i.e. *Dada's*] again emphasizes that *Bhyat's* case must be seen in its proper perspective, and that it does not purport to lay down any general principle

which serves to limit the Court's discretion in matters of this kind. It may be that if the magistrate had *Dada's* case before him, he might have come to a different conclusion. Speaking for myself I would not have made the order as to costs that he did. The defendant was substantially successful in reducing the plaintiff's claim to 60 per cent and he himself succeeded in his claim to the extent of 40 per cent; I do not think, under the circumstances of the particular case, that I, had I been trying the case, would have deprived him of his costs.'

The decision in *Bhyat's Store v. Van Rooyen* (*supra*) was also questioned by Erasmus J. in *Manni v. Bekker*, 1964 (1) P.H., J. 5 (O), who decided that, where the claim and counterclaim were each partly successful, the costs should be apportioned (as was done by Roper A.J. in *Stolp v. Du Plessis*, 1960 (2) S.A. 661 (T)). See also *Annual Survey*, 1964, pp. 158-60.

It is submitted, therefore, that, in view of the fact that *Bhyat's* case was, as shown by Boberg (*supra*) at 148-55, to be founded on a misconception of the decision in *Fripp v. Gibbon & Co.*, 1913 A.D. 354, and in view of the opposing decisions aforementioned, the costs, in apportionment of damages cases, should, in justice, be awarded in inverse proportion to the blameworthiness of the respective parties, irrespective of the fact that the balance of damages is in favour of one particular party.

Joint Defendants. Where one joint defendant was found to have been more negligent than the other, Van Winsen J., in *Flango v. Phoenix Assurance Co., Ltd. and another*, 1964 (1) S.A. 131 (C), refused to apportion to each his aliquot share of costs.

Pleadings

In *Van Niekerk v. Labuschagne*, 1959 (3) S.A. 562 (E), Wynne J. said that any form of pleading (by the defendant) which seeks to rely upon an apportionment under Act 34 of 1956 must specifically allege that the plaintiff has suffered damage partly by his own fault and partly by the fault of the defendant, otherwise it is excipiable, but this statement was held to be an *obiter dictum* and was distinguished in *Van der Merwe v. Fourie*, 1959 (3) S.A. 568 (E) at 572, where it was held that an averment of negligence is equivalent to a statement of a reliance upon the plaintiff's 'fault'. In any case the court cannot be debarred by the niceties of pleadings from applying the provisions of the Act unless it can be shown that the other party was prejudiced and where the whole matter has been fully canvassed at the trial (*Tonyela v. S.A.R. & H.*, 1960 (2) S.A. 68 (C) at 72).

Statutes of limitation of action or notice

Section 1(2) provides that where a party sets up the defence that the period has been exceeded wherein notice should have been given him, or wherein the action should have been commenced, he may not thereafter, in a counterclaim or in answer to a counterclaim, be entitled to recover damages (see *ante*, pp. 45-6).

THE CESSINARY

The fact that the plaintiff has been guilty of contributory negligence does not bar his claim as a cessionary of the rights of action of a person

who was not so contributorily negligent (*Botes v. Hartogh*, 1946 W.L.D. 157). In this case, while the plaintiff was driving his father's car, he collided with the defendant. A passenger in the car driven by the plaintiff was injured. The plaintiff sued as cessionary from his father and also his passenger in respect of the damage sustained by both of them individually. Held, that even if there was joint negligence on the part of both drivers, the plaintiff was not debarred from recovering damages as cessionary of the claims of *innocent third parties*, and furthermore, assuming that the plaintiff and the defendant were joint tortfeasors in respect of the third parties, their claims had not been extinguished merely by plaintiff's promise to pay them.

8. NEGLIGENCE OF THIRD PERSON

At common law it was a good defence to an action to show that the proximate cause of the damage sustained was due, not to the acts of the defendant, but to the act of some third person. The onus of establishing such defence is, however, on the defendant (*Khan v. Texas Co. (S.A.) Ltd.*, 1942 C.P.D. 213).

If the negligence of A has caused damage to B, it is no defence to an action by B that the negligence of some third person C concurred in causing it (*Du Toit N.O. v. Volks*, 1937 P.H., O. 3 (T); *Joffe & Co. v. Hoskins & Aitkin (Pty.) Ltd.*, 1941 A.D. 431). Where the negligence of two persons was joint in causing damage to a third, he can sue either of them for the whole damage (*Lee's case*, 1927 A.D. at 206, per Watermeyer J. and per Kotzé J.A. at 226. See also *Cantamessa v. Reinforcing Steel Co., Ltd.*, 1940 A.D. 1; *Martindale v. Wolfaardt*, 1940 A.D. 235; *Salmons v. Jacoby*, 1939 A.D. 589; *Katz v. Bloomfield*, 1914 T.P.D. 379 *et ibi cit.*, and the section on Joint Tortfeasors, *post*, p. 280.

But for this rule to apply it is essential that the negligence of the defendant should have 'caused' the damage in the legal sense, i.e. should have been the proximate and not a remote cause. Therefore, even though the negligence of the defendant was one of the inducing causes, without which the damage would not have been suffered, if it was not the proximate cause, the action will fail. This proposition necessarily follows from the rule, *proxima causa, non remota, spectatur*. There is express authority for it in English law in *Weld-Blundell v. Stephens* [1920] A.C. 956, and for South Africa in *McRitchie v. S.A.R.*, 1918 N.P.D. 311, in *S.A.R. v. Acutt & Worthington*, 1935 N.P.D. 314, and in *Niehaus v. Worcester D.C.*, 1932 C.P.D. 53.

The principles of the common law, above mentioned, would now appear to have been considerably nullified by the provisions of section 2 of the Apportionment of Damages Act, since, once the defence is raised in the defendant's pleadings to the effect that a third party was the proximate and effective cause of plaintiff's damage, the latter will almost inevitably apply to have that third person joined as a co-defendant in terms of subsections (1), (2) and (3) of section 2 of the Act, otherwise the plaintiff will incur the disadvantage of subsection cf. (4) of losing his recourse against that third party (cf. *Kleinhans's case*, 1959 (2) S.A. 619 (E) at 626-7).

Section 2(14) of the Act expressly provides that a person shall, for the purpose of section 2, be regarded as a joint wrongdoer notwithstanding

the fact that that other person had 'an opportunity of avoiding the consequences of his wrongful act and negligently failed to do so'.

It is submitted, however, that even if such third party is so joined, the defendant could still succeed in his defence at the trial by establishing that the act of the third person in question was one of *novus actus interveniens* unforeseen by him, completely separated in point of time and was the decisive, or only, cause of plaintiff's damages (see *post*, pp. 81-2 and 95-6 and also the chapter on Causation and Remoteness of Damage (*post*, p. 77), where, after a discussion of the general questions, the particular question of the effect on liability for negligence of the intervention of the act of a third party is discussed (*post*, p. 86).

Two Defendants

Section 2 of the Act, authorizing action being brought against two wrongdoers when such wrongdoers are jointly and severally liable in delict for some damage, does not overrule the Union Rule of Court No. 12, providing that action may be brought against two or more defendants when it is uncertain which of the two (or more) defendants may have been responsible for the damage caused (*Jooste v. Ally*, 1960 (4) S.A. 31 (W)). In this case both defendants collided with plaintiff and he was unable to say who caused what damage.

9. IDENTIFICATION

In what has been said above, it has been assumed that the third party whose negligence has intervened between the negligence of the defendant and the damage, is strictly a 'third party' in the eye of the law; that is to say that there is no legal round on which the defendant is to be 'identified' with the acts of that third party. For if there is any legal ground for such 'identification', then the defendant is to be treated as if those acts were his own.

(a) **Servant.** The principal ground for such identification is that the third party was the 'servant' of the defendant. By 'servant' in this connection is meant that the defendant had the power of controlling the acts of that third party; a principle which is fully examined *post*, p. 99. Nor is the driver in charge of a lorry criminally liable for the negligence of a person who has been allowed by him to drive the vehicle unless it is proved that the driver could have taken steps to prevent the accident (*R. v. Horn & Britz*, 1938 T.P.D. 174). A more recent ground of identification is that the owner is, as a passenger, 'in effective control' of the vehicle driven by his servant (a matter which is fully discussed *post*, p. 104) and is a principle which virtually renders the decision in *Archibald & Co. v. Sabela*, 1953 (1) S.A. 254 (N), obsolescent.

(b) The **passenger** in a vehicle is not so identified with the driver (*Greenshields v. S.A.R. & H.*, 1917 C.P.D. 209; *McRitchie v. S.A.R.*, 1918 N.P.D. 311); unless the relationship between them is such as to make the driver the passenger's 'servant' (as to which see *post*, p. 102), or unless the passenger happened to be the owner of the vehicle involved in the collision (see *post*, p. 102). The action of the owner-passenger in grasping the driving wheel of a vehicle and causing it to mount a pavement thereby killing a child, can attract criminal liability (*R. v. Colyn*, 1939 (1) P.H., O. 26).

(c) One **spouse** is not identified with the other, either in an action brought for personal damages by reason of an accident in which the other spouse was the driver (*Pretoria Municipality v. Esterhuizen*, 1928 T.P.D. 678; *Mackenzie v. Durban Corporation*, 1935 N.P.D. 148). In both these cases it was ruled that, even though the wife was married in community of property, she could, as *plaintiff*, be entitled to sue in delict in respect of damages suffered by her *personally* also in an action for damages consequent on the death of the other spouse (*Lee's case*, 1927 A.D. 202). The identification of a husband, married out of community of property, with the *culpa* of his wife does not, therefore, arise as an incident flowing from the marriage. This liability would only arise where the facts show that the wife was acting as the *servant* or the *agent* of the husband (*Steinbreucker v. Union Govt.*, 1947 (1) S.A. 832 (T), and *Slabbert v. Holland*, 1936 N.P.D. 238). In other words, the one spouse is not personally liable for the delict of the other (Van der Keessel, *Th.* 22, and Van der Linden 1.3.7). (See *post*, pp. 266–7.)

The wife of one of the negligent parties, not being one of the wrongdoers involved in a motor accident, cannot therefore be made to suffer an apportionment of her loss under Act 34 of 1956 (*Kleinhans v. African Guarantee & Indemnity Co., Ltd.*, 1959 (2) S.A. 619 (E) at 626–7) and this is so even if she is married in community of property; *De Beer v. Haagman N.O.*, 1963 (1) S.A. 582 (T), at 587 where (after citing with approval the judgment of Murray J. in *Lock v. Keers*, 1945 T.P.D. 113, at 116) it was held that the husband was not even entitled to settle his wife's claim for the *personal injuries* suffered by her. Here Kuper J. held (at 585) that the effect of section 2(6) of the Matrimonial Affairs Act, No. 37 of 1953, is that today she does not need the assistance of her husband and can sue in her own name. See, also, Professor Hahlo in (1958) *S.A.L.J.* 202. The position would be otherwise in regard to her claim for *medical expenses*, for which the husband would normally be liable (*De Vaal v. Messing*, 1938 T.P.D. 34 at 40, and *De Beer's case* (*supra*) at 587), but, even in this regard, she is entitled to sue a defendant provided she is duly assisted by her husband (*Schlebusch v. President-Versekeringsmaatskappy*, 1963 (4) S.A. 737 (T)). Since a wife, married by antenuptial contract excluding the marital power is entitled to sue her husband, both *ex contractu* and *ex delictu*, she is entitled to sue the insurers of her husband for damage suffered by her as a result of the negligent driving by her husband (*Rohloff v. Ocean Accident & Guarantee Corpn., Ltd.*, 1960 (2) S.A. 291 (A.D.) at 302 and 304). As to the liability of the joint estate in damages and in costs, see *ante*, p. 42.

(d) The **dependants** are not identified with the *deceased* parents. In all actions by these parties, therefore, the negligence of the deceased is a defence only if it was solely the proximate cause (*Wilson v. S.A.R. & H.*, 1940 N.P.D. 509); if it was merely part of the proximate cause, operating jointly with that of the dependant, they are entitled to succeed.

The question whether a *young child* under the care of a guardian or parent is 'identified' with the negligence of that adult is examined *ante*, p. 25.

CHAPTER IV

CAUSATION AND REMOTENESS OF DAMAGE

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GENERAL PRINCIPLE

It is not for every consequence of his negligent conduct that a man is responsible in law, for *in jure causa proxima non causa remota spectatur*. The guiding principle is that though the negligence of the defendant may have been one of the inducing causes leading up to the damage (a cause without which the damage would not have been suffered (*causa sine qua non*)), he will not be liable unless it was the 'actual', 'effective', 'proximate' cause (*causa causans*), in the sense that he was blameworthy in some degree in being the cause of the plaintiff's damages.

So much is elementary. Not only is the law incapable of measuring the remote consequences of an act, but to do so, and to impose corresponding liability, would conflict with the fundamental rule of policy that human activity should not be unreasonably hampered. It is essential therefore to establish some limit of liability—to distinguish between consequences, and to say that for some consequences a man shall be liable, while for others he shall not. How is the limit to be drawn; and what test is to be applied to determine whether in a particular case consequences are, or are not,

'too remote'? This problem is among the most difficult of application in the whole range of our law. To seek a formula which will 'solve' every case is probably to seek the impossible, and the most that we can expect to find is a practical guide to the exercise of common sense and human experience; but even to extract such a guide from the decisions is, in many cases, extremely difficult.

Previously, in every case in which damages were sought on the ground of negligence two separate questions presented themselves: (a) Was the defendant negligent and, if so, (b) did his negligence actually cause the damage which the plaintiff claims? Now, under the Apportionment of Damages Act, the question is: Did the defendant cause *all* the damages which the plaintiff claims or are those damages to be reduced on account of the plaintiff's own contributory negligence, i.e. his own fault? (see *ante*, pp. 65-74.

WAS THE DEFENDANT NEGLIGENT?

Though this question may raise very great difficulties in practice, particularly where the question at issue is whether the defendant should have anticipated and guarded against the acts of third parties, the test to be applied is settled and familiar, namely, should he as a *diligens paterfamilias* have foreseen and guarded against the danger of harm to the defendant? See *Joffe & Co. v. Hoskins and another*, 1941 A.D. at 450. This test, and its application, has already been considered in the General Chapter (*ante*, at p. 8). But it seems advisable to recall here that it is not negligence in the *abstract* which is in consideration (if there can be such a thing as negligence in the abstract) but negligence vis-à-vis the plaintiff—the breach, that is to say, of a duty owed to the plaintiff, and in respect of consequences which might ensue to the plaintiff. The importance of this observation will appear subsequently (see *post*, p. 78, and illustrative cases, *post*, pp. 95-6).

PROXIMATE OR REMOTE CAUSE?

Even though the question of *culpa* be answered in the affirmative, the defendant may nevertheless not be liable to the plaintiff, either at all or in respect of only some of the damages claimed. This will be so where his negligence has not 'proximately caused' the damage.

As was pointed out in *Pierce v. Hau Mon*, 1944 A.D. at 199, no definite principle can be laid down to establish whether the damage is 'proximate' or 'remote', this point being a matter of logic, common sense, justice, policy, and precedent. It is really a flexible line; for we find that as the wrongful act, which is alleged to have caused the damage, increases in **moral obliquity** or **illegality**, the legal eye reaches further and will declare damage to be proximate which, in other considerations, would be considered to be remote. It follows that the court should bear in mind the dicta of Scott L.J. in *Smith v. Harris* [1939] 3 All E.R. at 964, where he says:

'I respectfully agree with Lord Wright in *McLean v. Bell* at 264, "the decision however, of the case must not turn simply on causation, but on responsibility".'

In some cases it is at once apparent that there is no causal connection at all between the negligence and the damage. Such rare cases are exem-

plified by *Jordaan v. Smith*, 1915 E.D.L. 166, where defendant let his ox graze on a commonage without taking out a licence. The ox gored defendant's horse. Graham J.P., accepting the law on damage by animals as it then stood in the Cape, viz. as depending on negligence, held that there was 'no connection whatever' between the negligent act of failing to take out a licence, and the damage to the horse. With this may be compared *Strathsomer's Estate v. Rickards*, 1908 E.D.L. 395, where, the plaintiff estate having removed a bridge, defendant claimed in reconvention for the value of certain hay which was lost when being carried by wagon through the flooded furrow, though this case may also be regarded as an instance of the interposition of the 'voluntary act of the plaintiff' (as to which see *post*, p. 88). Illustrative cases relating to the proximity or remoteness of damage are quoted *post*, p. 93. In the sphere of criminal law the determination of proximate cause, as a yardstick for ascertaining liability, is the finding of some *guilty nexus* between the act complained of and the resulting damage or injury suffered by the complainant or the deceased person (*S. v. Van der Mescht*, 1962 (1) S.A. 521 (A.D.), and *R. v. John*, 1969 (2) S.A. (R.A.D.), detailed *post*, pp. 93-7.

TESTS APPLIED

What is meant by causal connection? The lawyer sought for some formula which will solve the problem of liability. He sought for a 'proximate cause' of the damage and tried to discover who had the 'last clear chance' of avoiding the damage and to allocate liability accordingly. There are, however, leading judgments which drew a distinction between 'cause' and 'responsibility'. Thus Lord Sumner, in *British Columbia Electric R.C. v. Loach* [1916] 1 A.C. at 727, said:

'The decision, however, of the case must turn not simply on causation, but on responsibility. The plaintiff's negligence may be what is often called a *causa sine qua non*; yet, as regards responsibility it becomes merely evidential or a matter of narrative, if the defendant, acting reasonably, could, and ought, to have avoided the collision.'

These words were quoted with approval by Scott L.J. in *Smith v. Harris* [1939] 3 All E.R. 964 and see also *Lord and another v. Pacific Steam Navigation Co.* [1943] 1 All E.R. 211 (C.A.) — 'The Oropesa'.

Certain metaphors were employed in order to express the judgments in fixing liability, and to clarify their reasoning. The most common metaphor is the 'chain of causation' which may be 'snapped' by the act of another party or some outside agency such as *vis major*. Other judges speak of a conduit pipe, a transmission gear which may become insulated from the ultimate result (see *Weld-Blundell v. Stephens* [1920] A.C. 986). Lord Shaw, in *Leyland Shipping Co. v. Norwich Fire Insurance Soc.*, 118 L.T. 126, preferred to regard causation as a 'net', while to Judge Andrews causation is neither a chain, nor a net, but a river in which each tributary plays an effective and somewhat indistinguishable part. To 'Aquarius' in (1941) 53 *S.A.L.J.*, causation is neither a chain, nor net, nor a river, but a labyrinthine maze!

These various tests assumed considerable importance either by reason of their being resorted to by the defendant for the purpose of resisting

the claim against him or, alternatively, being applied by the plaintiff for the purpose of evading the fatal consequences of his claim by reason of some alleged *culpa* or carelessness on his part when seeking to establish his claim for all his damages against the defendant. Their significance has, however, been considerably reduced by Act No. 34 of 1956 and, would, in many cases, be quite inapplicable, but there must be other instances where, in appropriate circumstances, they could be applied for the purpose of determining the degree of 'fault', attributable to one or both of the respective contesting parties, as a guide to the *pro rata* assessment of damages.

For an interesting case, where the Apportionment of Damages Act was found not to be applicable and where the negligence of the defendant's servants was found to be the *causa causans* of the loss suffered owing to the fraudulent alteration of a cheque, see *Barclays Bank D.C.O. v. Straw*, 1965 (2) S.A. 93 (O) (detailed *post*, p. 96).

As a starting-point we may begin with saying that **a man is legally responsible for all the intended consequences of his acts**. If to this proposition we add the presumption that **a man is presumed to intend all the reasonable and probable consequences of his acts** we arrive at the conclusion that he is to be held legally accountable for all consequences which occur 'naturally' as well as those which he foresaw or desired.

The objections to such simple formulae are that (a) one act does not produce all its consequences immediately, and (b) a harmful result may be produced by the acts of several persons, including the acts of plaintiff.

What are the 'natural' results? In this regard there are two opposing schools of thought. The one school, of which Pollock may be considered the chief exponent, held that the test of remoteness was the same as the test of negligence; and that, consequently, a man was liable only for such consequences as he could **reasonably be expected to have foreseen** as the 'natural and probable' result of his acts (see *Bourhill v. Young* [1942] 2 All E.R. 396 (H.L.)). The other school, of which Beven was the principal exponent, holds that the **test of foreseeability is irrelevant** on the question of remoteness; that once it has been determined that a man was negligent, **he is liable for all consequences which are the 'direct' results of his acts**, whether he could reasonably be expected to have foreseen them or not.

Probably no legal principle has evoked such a wide divergence of views and such controversy as the difficulty in finding liability based on the remoteness or otherwise of damages, nor have the more recent decisions thrown any clear light on this vexed problem. (See *Wilson v. Birt (Pty.) Ltd.*, 1963 (2) S.A. 508 (D) (unforeseen proneness to injury can attract liability); *Ocean Accident & Guarantee Corp., Ltd. v. Koch*, 1963 (4) S.A. 147 (A.D.) (psychological 'overlay' resulting in coronary thrombosis); *Alston and another v. Marine & Trade Ins. Co., Ltd.*, 1964 (4) S.A. 112 (W) (plaintiff allergic to cheese after treatment with a particular drug); *Kruger v. Van der Merwe and another*, 1966 (2) S.A. 266 (A.D.) (foreseeability of the general nature of harm only required), and *Van den Berg v. Parity Insurance Co., Ltd.*, 1966 (2) S.A. 463 (W), where the Appeal Court's ruling on the facts enabled it to avoid a direct pronouncement on the problem.) In this regard there would appear to be four schools of thought obtaining on the problem:

- (a) the *direct consequences test*, as qualified by the *novus actus interveniens* rule the *Polemis* case [1921] 3 K.B. 560, and supported by *McKerron on Delict* (6th ed.), pp. 116–29);
- (b) the *condictio sine qua non* approach, as limited by the foreseeable damage test as set out in the ‘*Wagon Mound*’ cases [1961] 1 All E.R. 404 (P.C.) and also [1966] 2 All E.R. 707 (P.C.);
- (c) the *probable consequences test*—similar to the continental theory of ‘adequate cause’ (see Professors Joubert and Van der Walt (1964) 81 *S.A.L.J.* 504 and *T.H.R.-H.R.* 244); and
- (d) the tests set forth by Hiemstra J. in *Alston and another v. Marine Trade Ins. Co., Ltd.*, 1964 (4) S.A. (W) at 116, when adopting the American Restatement of the Law of Tort as an alternative to the weaknesses found by him in the *Wagon Mound* case. This suggestion has been criticized by Honoré in (1964) 81 *S.A.L.J.* 410, Turpin in (1965) *Camb. L.J.* 34, and Boberg in *Annual Survey*, 1964, p. 185. Indeed the conclusions in *Alston’s* case (*supra*) have not been followed in any other South African decisions. See also *Fleming on Tort* (3rd ed.), p. 177; Glanville Williams, *Camb. L.J.* 64, and Stuart in (1967) 84 *S.A.L.J.* 76 and (1966) 83 *S.A.L.J.* 243.

These theories are discussed further below.

(a) DIRECT CAUSE

This is the principle that the defendant is liable for all the loss or damage suffered by plaintiff as a *direct result* of the defendant’s negligence and is based on the theory that ‘but for the negligence of the defendant’ the plaintiff would not have suffered any damage at all (see the *Polemis* case (*supra*)). The underlying concept of this rule is: Why should an innocent plaintiff be made to suffer the damages of loss or injury caused by the negligent act of the defendant even though, perhaps, the results of his actions were quite unforeseen by him? (See (1961) 78 *S.A.L.J.* 282 and *McKerron on Delict* (6th ed.) at pp. 116–26.) The only exemptions, under this rule, would be that there was an unexpected intervening causative act by some third person, or where the damage suffered was by a party to whom the defendant owed no legal duty whatsoever (*ibid.* and *Harnett v. Bond* [1925] A.C. 669; *Hambrook v. Stokes Bros.* [1925] 1 K.B. 141; *Bottomley v. Bannister* [1932] 1 K.B. 458).

This principle has been discounted by a series of cases commencing with *Bourhill v. Young* [1942] 2 All E.R. 396 (H.L.) and ending with *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., Ltd.* [1961] 1 All E.R. 404 (P.C.) (hereinafter referred to as the *Wagon Mound* case No. 1), but would still find considerable support in the ‘*thin skull*’ cases of *Dulieu v. White & Sons* [1901] 2 K.B. 669; *Smith v. Leech Brain & Co. and another* [1961] 3 All E.R. 1159 (Q.B.) (predisposition to cancer) and *Wilson v. Birt (Pty.) Ltd.*, 1963 (2) S.A. 508 (D) (propensity to epilepsy), which rule remains unaffected by the decision in the *Wagon Mound* case (see *Smith’s* case (*supra*) at 1611: *Ocean Accident & Guarantee Corp. v. Kock*, 1963 (4) S.A. 147 (A.D.) at 152 (coronary thrombosis) (see *ante*, p. 13), and see *Luntz* in (1964) 81 *S.A.L.J.* at 18, and *McKerron* in (1962) 74 *S.A.L.J.* 324). The doctrine that a defendant must take the plaintiff

as he finds him, and would therefore be liable in greater damages for injury caused to a wealthy defendant than to a poor man, has never been questioned; consequently, in view of the conclusions arrived at, in regard to the unacceptability of the 'direct cause' rule, it must be regarded as the one and only exception to the 'foreseeability of damage' rule.

The 'direct cause' principle has its counterpart in the doctrine of *versari in re illicita* in criminal law, which doctrine has been rejected, not only in England (*R. v. Church* [1965] 2 All E.R. 72 (C.A.)) but also in South Africa (*S. v. Van der Mescht*, 1962 (1) S.A. 521 (A.D.), and *S. v. Bernardus*, 1965 (3) S.A. 287 (A.D.)). In Rhodesia the same view was taken in *R. v. Gazembe*, 1965 (4) S.A. 208 (S.R.). The latest decision on the *versari* rule is now that of *R. v. John*, 1969 (2) S.A. 560 (R.A.D.), where, after an exhaustive review of all the authorities on this point, the Court held that (a) the much-disputed decision in *R. v. Matsepe*, 1931 A.D. 150, was a correct one, (b) that the dictum of Rumpff J.A. in *S. v. Bernardus* (*supra*) was too widely stated (at 571 C), and (c) in the words of McDonald J.A. at 564A:

'... in the final analysis the determination of legal cause, whether in civil or criminal cases, necessarily involves at some point the application of common sense and human experience to arrive at what is essentially a value judgment.'

and at 571H):

'Eggshell skulls and weak hearts and other human ailments which might cause a man to die from a trivial assault are well within the range of ordinary human experience.'

In this case the Court did not, in argument, agree with the submission made by Stuart in (1967) 84 *S.A.L.J.* at 86, that the thin skull rule does not apply in criminal law.

It is clear, therefore, that the application of common sense and human experience depends largely on historical knowledge, for it is obvious that the ruling in the second *Wagon Mound* case was given in the light of the facts of the first *Wagon Mound* trial—a scientific factual finding which was actually discounted recently when the Royal Air Force unsuccessfully attempted to ignite oil, dispersed by the *Torrey Canyon* ship on the open sea surface, by the use of incendiary bombs. (See Kerr (1969) 86 *S.A.L.J.* at 185–6 and *post*, p. 85.)

The conclusion, therefore, is that what ought, or should, have been foreseen by the party concerned depends entirely on the circumstances of each particular case. The spectrum of foresight while now being a wide as well as a penetrating one must, nevertheless, always be conditioned by the normal test as to what an ordinary *bonus paterfamilias* should have anticipated in the position in which he at the time found himself.

(b) CONDUCTIO SINE QUA NON TEST

This test is the one propounded by Professors Van der Merwe and Olivier in *Die Onregmatige Daad in S.A. Reg* (see pp. 124–6), who suggest that the solution to the difficult cases on cumulative causation is to apply the test 'globally' and not separately to each cause. There is much to be said for this view, limited, as the authors indicate, by the foreseeability test, as set out by Bekker J. in *Van den Berg's* case, 1966 (2) S.A. 621 (W). See also (1951) *T.H.R.-H.R.* at 126 and (1965) *T.H.R.-H.R.* at 172.

(c) THE PROBABLE CONSEQUENCES TEST

This is the test propounded by Professor Joubert and also Van der Walt in (1964) 81 *S.A.L.J.* 504 and (1966) 29 *T.H.R.-H.R.* 244 in criticizing the decision of Harcourt J. in *Wilson v. Birt (Pty.) Ltd.*, 1963 (2) S.A. 508 (D). This test has its tempering effect or influence in the theory of 'adequate cause' or an adequate connection between the act and the consequences thereof.

(d) FORESEEN RESULT

Negligence is not an abstract conception; it cannot be divorced from a consideration of consequences. A man is not negligent *in vacuo*; he is negligent in not guarding against consequences. It follows that the same act may be negligent in respect of certain consequences, and not in respect of others (see Lord Russell's dictum in *Bourhill v. Young* [1943] 2 All E.R. 44 (H.L.)). To take a fictitious example: Suppose that A is carrying through a street a valuable china bowl. He drops it, and a splinter enters the eye of a passer-by. His act in dropping the bowl may well be negligent as against the owner of the bowl because he should have foreseen the danger of its breaking, but not negligent as against the passer-by (because the danger to the latter was not such as a reasonable man would have foreseen). See the American case of *Palsgraf v. Long Island Railway* (1928) 248 N.Y. 339, cited by *McKerron on Delict*, p. 25. By the same reasoning, the same act may be negligent, as against the same person, in respect of some consequences, which should have been foreseen (*Bruce v. Berman*, 1963 (3) S.A. 21 (T)), and not in respect of others, which could not reasonably have been foreseen. In *Milton v. Vacuum Oil Co.*, 1932 A.D. 197, Wessels J.A. recognizes (at 206) that an act which may be negligent as against one person will not be as against another. To hold a man liable, in respect of negligence, for all consequences which he could not reasonably have foreseen, appears therefore to be an error in logic (*Workmen's Compensation Commissioner v. De Villiers*, 1949 (1) S.A. 474 (C), and *S. v. Van der Mescht*, 1962 (1) S.A. 521 (A.D.)).

FORESEEABILITY TEST NOW ACCEPTED

In South Africa and in the United Kingdom the foreseeability test, as a criterion of liability, has now been accepted and applied in all cases involving the imputation of negligence. This is to the effect that **a person is liable for all the consequences of his negligence which, objectively viewed, he should have reasonably foreseen as resulting from his conduct** in the sense that it is not necessary that he ought to have foreseen the **actual or detailed** results thereof but that he should have foreseen the generality of the consequences thereof, namely, **damage of the kind produced**. This test has been applied in both the *Wagon Mound* cases [1961] 1 All E.R. 404 (P.C.) and [1966] 2 All E.R. 709 (P.C.); *Ocean Accident & Guarantee Corp. v. Kock*, 1963 (4) S.A. 147 (A.D.) at 152; *Kruger v. Van der Merwe*, 1966 (2) S.A. 266 (A.D.) at 272 (applying a *novus actus* which should have been foreseen); *Parity Insurance Co., Ltd. v. Van den Bergh*, 1966 (2) S.A. 621 (a ruling which was unaffected on appeal, *eo nomine* in 1966 (4) S.A. 463 (A.D.)) and *Alston and another v. Marine Trading Insurance Co., Ltd.*, 1964 (4) S.A. 112 (W) at 114. (Summarized and criticized *post*, p. 85.)

In this regard, the dictum of Viscount Simmonds in the *Wagon Mound* case No. 1 (*supra*) at 413 is pertinent when he said:

'It does not seem consonant with current ideas of justice and morality that, for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all the consequences, however unforeseeable and however grave, so long as they are said to be "direct".'

See also Dr. Goodhart (1960) 76 *L.Q.R.* 567 and (1961) 77 *L.Q.R.* 179; Glanville Williams (1961) 77 *L.Q.R.* 62 and 179; Hart and Honoré, *Causation in Law*, pp. 165-7; and Van der Merwe (1965) 28 *T.H.R.-H.R.* 173.

The result is that 'there can be no liability until damage is done. It is not the act but the **consequences** upon which the tortious liability is founded', per Viscount Simmonds in the *Wagon Mound* case No. 1 at 415. Consequently, in future, there will not be two questions of law in negligence cases, i.e. (a) initial responsibility and then (b) remoteness, but only one question: 'Was the defendant negligent in regard to this damage?' (Glanville Williams (1961) 77 *L.Q.R.* 179).

In both the *Wagon Mound* cases the circumstances were almost identical inasmuch as the defendant had allowed to be discharged upon the waters of the harbour a large quantity of oil effluent which caught alight. In the first case the defendant, upon seeing that oxy-acetylene welding work was being carried on at the time some 600 feet away at the plaintiff's wharf, ordered the taking on of furnace oil to cease and telephoned the manager at the Caltex wharf to find out whether there was any danger of the oil catching alight. Upon being assured by the manager that there was no such danger, he ordered the work to be resumed. Two days later the oil caught fire, causing damage to the plaintiff's wharf. Subsequent experiments showed that the oil could not have caught alight by the dropping of molten lead but that it could have been ignited by a piece of cotton waste, or some similar substance acting as a wick. In the second case [1966] 2 All E.R. 709 (P.C.), the Court, no doubt influenced by the first case, held that, while oil on water is very rarely ignited, nevertheless there was a reasonable possibility and risk of its doing so and that this should have been guarded against. Accordingly, in this case, the plaintiff was entitled to succeed. (See Stuart in (1966) 83 *S.A.L.J.* 509.)

Reasonably foreseeable. It is manifest that a reasonable man should foresee only what is a reasonably possible contingency, for 'one cannot be expected to make provision against an unusual concatenation of circumstances' (per Morris L.J. in *Watt v. Hertfordshire C.C.* [1954] 2 All E.R. 368 (C.A.) at 369; see also Schreiner J.A. in *Herschel v. Mrupe* (cited and quoted *ante*, p. 9)). Thus the risk of harm, to a person standing beyond the boundary fence, resulting from a cricket ball being struck over it, is so infinitesimally small that a reasonable man would be justified in disregarding it (*Bolton v. Stone* [1951] 1 All E.R. 1078 (H.L.), and see also *Doughty v. Turner Manufacturing Co.* [1964] 1 All E.R. 98 (C.A.)). Here an asbestos cover, after being knocked off by a fellow workman, fell into a cauldron of hot molten liquid. Chemical changes created or released water which turned into steam which, one or two minutes later, caused an eruption of molten liquid from the cauldron, injuring the plaintiff. Until this had happened no one knew or suspected that the heat

would cause this chemical change and here it was held that, although splashing would be foreseeable, the chemical change was not a foreseeable contingency.

INTERVENING CAUSE FORESEEABLE

The presence of an intervening cause may become a highly pertinent consideration in determining the problems both of causation and remoteness and also of the foreseeability of the actor involved. Where it has intervened between the negligence of the defendant and the damage complained of, it may become a *nova causa* to the extent of completely breaking the 'chain of causation', as in *Weld-Blundell v. Stephens* [1920] A.C. 956 where a third party left a defamatory letter lying about and where the House of Lords considered that the defendant was not responsible for the acts of the third party. On the other hand, where the negligent act of a third party is one which could reasonably have been foreseen, the defendant would not be relieved from liability (*Kruger v. Van der Merwe*, 1966 (2) S.A. 266 (A.D.) at 273), as where a person is, through negligence, thrown out of a motor-car on to a busy highway, and it should be anticipated that he might be run over by a passing motor vehicle (*Van den Bergh v. Parity Insurance Co., Ltd.*, 1966 (2) S.A. 621 (W)).

Each case must, therefore, depend upon its own particular facts, the degree of intervention involved depending on the degree of foreseeability of such intervention and upon the nature and quality of the superseding cause. In this regard the decision in *Alston and another v. Marine & Trade Insurance Co., Ltd.*, 1964 (4) S.A. 112 (W) is a classic example. Here, plaintiff suffered manic depressions due to an injury to the brain received in an accident. He was treated with a drug called parstellin. After taking the drug he ate cheese and, as a result, suffered a stroke which he attributed to the combined action of the cheese and the drug, and here the Court held that the stroke was due to the superseding cause for which the defendant could not be held responsible. This decision has been criticized by Honoré in (1964) 81 *S.A.L.J.* at 34 and by Turpin in (1965) *Camb. L.J.* at 34, and there appears to be much cogency in Honoré's submission that 'If a large portion of the population eats cheese we must expect a large proportion of those who are given parstellin (in the absence of any warning) to eat cheese also', and, therefore, on the basis of foreseeability, the plaintiff should have succeeded in his action.

If, on the other hand, the intervening cause merely *co-operated* with the defendant's negligence and has not operated subsequently to it, it will not break the chain of causation. Thus, in the *Oropesa* case [1943] 1 All E.R. 215 (C.A.) where a collision at sea, owing to the negligence of the defendant, took place and necessitated the crew taking to a lifeboat which subsequently capsized, it was held that the chain of causation had not been broken and that the heavy hand of causality still rested on the defendant. Here Lord Wright said (at 215) that the intervening cause must be 'ultraneous, something unwarrantable, a new cause coming in disturbing the sequence of events, something that can be described as either unreasonable or extraneous or extrinsic'. The co-operating effect of defendant's negligence is also illustrated in the decision in *S. v. Stavast*, 1964 (3) S.A. 617 (T). Here the accused, driving in a comparatively

narrow road, had decided to overtake the vehicles ahead and moved to the other side of the road for that purpose. She would probably have avoided the deceased pedestrian walking on that side of the highway had it not been for the fact that her child, who was standing on the front seat alongside her, had fallen on to the steering-wheel and turned it to the right, which caused the appellant's car to veer more to its right and collide with the deceased. Held that, although the child's falling on to the steering-wheel was an *actus interveniens*, that act did not absolve the appellant from responsibility for the deceased's death.

COMMON-SENSE RULE

From the foregoing it is clear that the problem of the determination of proximate cause is one of extreme complexity and difficulty involving a variety of considerations. No one rule has a precedence over another as the human mind reaches ever out and ever onwards in its quest for a just and equitable solution of each particular case. The decision of Andrews J. in the famous case of *Palsgraf v. Long Island Railway Co.*, 59 A.L.R. 1263, is instructive in this regard. Here he says:

'... the problem of proximate cause is not to be solved by any one consideration. It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take into account. . . . There is little in truth to guide us but common sense.'

He then details some hints which may be helpful in arriving at an equitable solution, namely:

- (a) Was there a natural and continuous sequence between cause and effect?
- (b) Was the one a substantial factor in producing the other?
- (c) Was there a direct connection between them without too many intervening causes?
- (d) Is the effect of cause on result not too attenuated?
- (e) Is the cause likely, in the usual judgment of mankind, to produce the result?
- (f) By the exercise of prudent foresight could the result have been foreseen?
- (g) Is the result, in terms of time and space, too remote from the cause?
To these we may add:
- (h) Whose is the graver fault and who is more greatly to blame?

NOVA CAUSA INTERVENIENS

Between the act of the wrongdoer and the final harmful consequence there may intervene either the act of some person or animal or some natural force which makes such a contribution to the ultimate result as to immunize the wrongdoer's act and, in effect, insulate it from the result complained of. Where such an intervening force becomes a superseding force so as to exonerate the wrongdoer from liability, the latter is entitled to base his defence on the maxim *nova causa interveniens*. Per Lord Wright in *Lord v. Pacific Steam Navigation Co. (The Oropesa)* [1943] 1 All E.R. 211 at 215 (C.A.):

'This means something which I will call ultraneous, something unwarrantable, a new cause coming in and disturbing the sequence of events, something that can be described as either unreasonable or extraneous or extrinsic.'

A *novus causa* is not comprehended where the reality of the circumstances indicate that the cause of the injury complained of was due entirely to the negligent act of the plaintiff whose action is the proximate and effective cause of her own damage without any negligence on the part of the defendant (see *Boberg* in (1959) 76 *S.A.L.J.* 280 in criticizing the application of the rule in *Clairwood Motor Transport Co. (Pty.) Ltd. v. Akal & Sons*, 1959 (1) S.A. 183 (N)).

(a) NATURAL FORCES

In regard to the intervention of natural forces, the authority is mostly negative. In *Sharp v. Powell*, L.R. 7 C. & P. 253, defendant, in breach of a by-law, washed his van in the street; the water was prevented from running away as the grating was frozen up, a fact of which the defendant was unaware. The plaintiff's horse slipped on the icy surface and it was held that the consequences were too remote. But this decision is now suspect (see *Weld-Blundell v. Stephens* [1920] A.C. at 984 and also *Manchester Corporation v. Markland* [1935] A.C. 360). Here the corporation was held liable (for failure to repair a water-pipe) to a motorist who skidded in the consequent ice-sheet. Where the natural force is one which should have been anticipated, it will not break the chain of causation, but a force which could not have been anticipated at that time and place probably will; see *River Weir Commrs. v. Adamson*, 2 A.C. 743, where a **storm** was regarded as an act of God excluding liability. But not in South Africa where exceptionally heavy storms are to be expected and should be allowed for (*Adm., Natal v. Stanley Motors, Ltd.*, 1960 (1) S.A. 690 (A.D.) at 700). In *Romney Marsh Bailiffs v. Trinity House*, 5 Ex. 204, a ship was negligently stranded on a sandbank; from there it was carried by **wind and tide** against plaintiff's wall; defendant was held liable. This case should be compared with *Yorkshire Dale Steamship Co. v. Minister for War* [1941] 3 All E.R. 214 (C.A.), where it was decided that the unexpected and unexplained tidal sea was the proximate cause of the stranding of the ship and that this intervening cause exempted the Government from liability.

Another example of **wind** is given in *Verster v. Vice*, 1946 O.P.D. 247, where Van den Heever J. said:

'Gevolglik word oorsaaklikheid, as toetssteen van toerekenbaarheid, steeds beïnvloed deur die skuldmoment. As ek op my eie akker op 'n stil dag die onkruid aan die brand steek en alle redelike maatreëls tref dat die vuur nie hande uitruk nie, en 'n onverwagte windvlaag laat die vuur tot my buurman se perseel vorder en daar skade doen, dan is my handeling onteenseglik in logiese sin, die oorsaak van my buurman se skade; in die reg egter, is die onverwagte vlaag wind die oorsaak daarvan, waarvoor ek nie verantwoordelik is nie (Dig. 9.2.30.4).'

Novus actus interveniens must be specifically pleaded before it may be raised as a defence (*Mordt N.O. v. Union Govt.*, 1939 T.P.D. 589).

(b) HUMAN AGENCY

The authorities make it clear that a human agency may so break the chain of causation as to 'insulate' the defendant from the consequences of his negligence. In fact, it would appear that as a general rule it will have

that effect, but subject to numerous and important **exceptions**, one of which was mentioned by Lord Wright in *North-Western Utilities, Ltd. v. London Guarantee & Accident Co.* [1936] A.C. 108, where he said, at 125, that although the act of a third party may be relied on by way of a defence in certain cases, the defendant may still be held liable in negligence if he **fails to foresee and guard against the interference** to his works by the action of a third party, since the foreseeable actions of another joint tortfeasor should be apprehended (*Kruger v. Van der Merwe*, 1966 (2) S.A. 266 (A.D.)). Here Williamson J.A. said (at 273):

'The very harm which befell the plaintiff was at all times an inherent possible consequence of the second defendant's conduct, albeit it was also in part caused by the negligence on the part of the first defendant. It was, in my view, in fact harm reasonably foreseeable to the second defendant.'

See also *A. Prosser & Sons, Ltd. v. Levy and others* [1955] 3 All E.R. 577 (C.A.). Furthermore, an act does not become a superseding cause if the intervening force is an act of a human being or animal in a **normal response to a situation** created by the negligent actor, such as an act due to fear or emotional disturbances, or to avert threatened harm or to counteract interference with rights and privileges (1941) *S.A.L.J.* 245).

Whether the defence of *novus actus interveniens* can be competently set up as a defence, therefore, depends primarily on the question of foreseeability (*Woods v. Duncan* [1946] A.C. 401 at 443; *Clairwood Motor Transport Co. (Pty.) Ltd. v. Akal & Sons*, 1959 (1) S.A. 183 (N)), that is to say whether the intervening act or cause should have been foreseen by a reasonable man. (See also *Joffe & Co., Ltd. v. Hoskins*, 1941 A.D. 431 at 455-6; *Foster v. Moss & Dell*, 1927 E.D.L. 208, and *Berlin Village Management Board v. Richter*, 1929 E.D.L. 59.) Where, therefore, a motorist collided with a cyclist, who was carrying a passenger, thereby causing the latter to fall on to the roadway where another motorist ran over him and killed him, Hiemstra J. held that such contingency, although a *novus actus* or intervening cause, should have been foreseen as a reasonable consequence of his negligent acts (*S. v. Kelder*, 1967 (2) S.A. 644 (7)). (See also (1959) 76 *S.A.L.J.* 280; *S. v. Motau*, 1968 (4) S.A. 670 (A.D.); *Van den Bergh v. Parity Insurance Co., Ltd.*, 1966 (2) S.A. 621 (W) at 626-8, and *Fischbach v. Pretoria City Council*, 1969 (2) S.A. 693 (T)). In the last-mentioned case the defendant was held liable for failing to take steps to safeguard against unknown persons removing the cover of a stormwater catchpit.

(i) **Act of plaintiff.** The act of the plaintiff, or of his servant, at one time clearly broke the chain of causation when it constituted 'contributory negligence' and formed the proximate cause of the damage (*Clairwood Motor Transport Co. (Pty.) Ltd. v. Akal & Sons*, 1959 (1) S.A. 182 (N), and *Mafesa v. Parity Versekeringsmaatskappy, Bpk.*, 1968 (2) S.A. 603 (O)). In the latter case the plaintiff's broken bone had been sufficiently clinically knitted and thereafter, while using his crutches, he had fallen on a slippery floor owing to his own carelessness and here it was held that the defendant was not liable for the prolongation of his recovery. But it is **not essential** that the act be **negligent**. As was said by Lord Sumner in the case of *S.S. Paludina* [1927] A.C. at 28, 'cause and consequence do not depend on the question whether the intervening act is excusable or

not, but on whether it is *new* and *independent* or not'. In that case, where by the negligence of ship A, ship B bore down upon ship C (plaintiff), the majority of the Court held that the acts of ship C constituted a *nova causa*, although they were not stigmatized as negligent. So in *Cutler v. United Dairies* [1933] 2 K.B. 297, the act of the plaintiff in voluntarily assisting to pacify a horse was held to be *nova causa*, though it was not necessarily a negligent act. Where, however, the plaintiff acts in a sudden emergency, or as the Admiralty phrase has it, in a 'situation of alternative danger' (*S.S. Paludina*, at 32); or in justifiable alarm or otherwise under the impulsion of the defendant's conduct; his act will not break the chain.

(ii) **Act of third party.** Subject to the foreseeability test indicated in *Kruger v. Van der Merwe*, 1966 (2) S.A. 266 (A.D.), the judgment of Lord Sumner in *Weld-Blundell v. Stephens* [1920] A.C. at 985 contains a valuable classification of the cases in which the act of a third party will *not* break the chain of causation. They are as follows:

1. The acts of **children** or **other irresponsible creatures** (e.g. *Martin v. Stanborough* (1920) 41 T.L.R. 1, car on slope insufficiently braked, set in motion by children). In order to evade liability on this ground there is an onus upon the defendant to show that the damage caused was due to some deliberate or mischievous act of some independent person (e.g. turning on a water-tap) (*A. Prosser & Sons, Ltd. v. Levy and others* [1955] 3 All E.R. 577 (C.A.)).

2. The acts of persons in a state of **excusable ignorance**, acting without any intention to injure others (*Elkins v. M'Kean*, 79 Penn. Rep. 493, dangerous package dealt with by innocent agent).

3. The acts of persons in a **state of excusable alarm** (*Scott v. Shepherd*, the squib case).

4. The acts of persons in the **exercise or defence of their rights without intention to injure** (*Clark v. Chambers*, the *chevaux de frise* case—which case, however, 'many persons have felt difficulty in fitting into any coherent relation with the rest of the law on this subject', per Lord Sumner, at 988).

5. The acts of persons **acting as the defendant meant them to act** or as he must have foreseen that they would act, in consequence of things done by himself for his own purposes, in a state of indifference as to the result to others (*Scott's Trustee v. Moss*, 17 R. 32, parachute descent, organizer liable for crowd breaking down fences, cf. the American case of *Guille v. Swann*, balloon ascent).

6. The acts of those dealing with **dangerous things**. This category raises difficulties. The difficulty of establishing its limits is sufficiently shown by the list given by Lord Sumner, viz. 'horses and guns, lamps and hairwashes, railway trucks and railway turntables'; and the difficulty is increased if it is to be extended to cover **things capable of being dangerous if left exposed to the interference of others**. The question of remoteness would seem to depend on the **amount of interference** necessary to render the object dangerous. The cases cited by Lord Sumner (*Illidge v. Goodwin* and *Lynch v. Nurdin*) are both cases of horses left unattended. Authorities on this question are summarized in *Deen v. Davies* [1935] 2 K.B. 282. In *Ruoff v. Long & Co.* [1916] 1 K.B. 248 an unattended lorry was set in motion by an adult and the Court found there was no negligence. In

Martin v. Stanborough, 41 T.L.R. 1, where only slight interference was sufficient and a child so interfered, it was held that the negligent driver was liable for the consequences. If **slight interference** will render the object dangerous, then no doubt it will not constitute a *nova causa*; but if considerable interference is required, this will surely be a *nova causa*, even if the object interfered with falls within the category of dangerous things (cf. *Dominion Natural Gas Co. v. Collins* [1909] A.C. 640, where it is recognized that even in respect of gas the act of a third party may constitute a *nova causa*). *Berlin V.M. Board v. Richter*, 1929 E.D.L. 59 (poisonous liquid in a dipping-tank), is a decision on dangerous things; though it turned on negligence and not on remoteness. See also *Joffe & Co. (Pty.) Ltd. v. Hoskins*, 1941 A.D. 431. In *Philco Radio & Television Corp. of G.B. v. Spurling, Ltd. and others* [1949] 2 All E.R. 129 (K.B.) the defendant's agent had, in error, delivered five packing-cases containing dangerously inflammable celluloid film to plaintiff's premises. No warning of their dangerous contents was given but the plaintiff's foreman, recognizing the material as inflammable and dangerous, had warned two workmen in charge of the cases not to smoke near them and telephoned the defendants to remove them. Before the cases were removed a typist in plaintiff's employ negligently lit a cigarette, causing the parcels to explode and cause damage, and here it was held that the chain of causation had not been broken and on appeal ([1949] 2 All E.R. 882 (C.A.)) it was ruled that the defence of *novus actus interveniens* could not prevail.

7. To these categories we should probably add the acts of persons who, in the course of duty, reasonably **attempt to save others** from the consequence of the defendant's wrongful acts (see *Haynes v. Harwood* [1935] 1 K.B. 146), but this would not apply to one unnecessarily assuming his own risk, as in stopping a bolting horse when no one is immediately imperilled (*Cutler v. United Dairies (London) Ltd.* [1933] 2 K.B. 297) (see *ante*, pp. 35 and 60).

8. **Inefficient medical treatment.** In England it has been held that *inefficient* treatment by a medical adviser may in some cases amount to a *nova causa interveniens* (*Rothwell v. Caverswall Stone Co.* [1944] 2 All E.R. 350), adopted by the House of Lords in *Hogan v. Bentinck Collieries* [1949] 1 All E.R. 588, where Du Parcq L.J. is reported to have said:

'Secondly, negligent or inefficient treatment by a doctor or other person may amount to a new cause and the circumstances may justify a finding of fact that the existing incapacity results from the new cause and does not result from the original injury. This is so even if the negligent or inefficient treatment consists of an error or omission whereby the original incapacity is prolonged.'

It is doubtful whether our own courts will, in spite of the great weight of this authority, adopt this view in its entirety, for it is a startling proposition that a party's right to compensation depends on the degree of skill or care of his doctor. (See *Marshall v. Southern Insurance Ass., Ltd.*, 1950 P.H., J. 6 (N).) It is submitted, therefore, that each case will be dealt with on its own merits. It may be that where the treatment, or lack of care, on the part of the plaintiff's medical man is so inadequate as to amount, it itself, to negligence in delict, that a *nova causa* may be said to have intervened (Dig. 9.2.30.4; see *post*, pp. 131-4). But a refusal to undergo medical attention or a delay in rendering proper treatment, or a bona fide incorrect

diagnosis, could hardly be an exculpatory factor operating in favour of the defendant (see *Rooi v. Regina*, 1952 (2) P.H., H. 119 (T)). Nor would a person escape liability on the ground that the victim was, at the time, suffering from some malady or illness which would eventually have caused his death (*R. v. Makali*, 1950 (1) S.A. 340 (N) at 343-4) since there would be no break in the chain of causation.

Unless the intervening act of the third party falls within one of the above categories, then it will ordinarily be held to operate as a *nova causa*. The phrase employed in *Dominion Natural Gas Co. v. Collins* [1909] A.C. 640, 'the conscious act of another volition', is equivalent to that used in *Ward v. Weeks*, 7 Bing. 215, which is expressly approved in *Weld-Blundell v. Stephens*, 'the voluntary act of a free agent over whom the defendant had no control'.

The intervening act need not be malicious: in *Harnett v. Bond* [1924] 2 K.B. 517, [1925] A.C. 669, it was held that the act of doctors in performing their statutory duty in examining a patient in a mental asylum broke the chain of causation in respect of the act of the defendant in originally committing the patient. Probably no distinction can be drawn between acts of commission and acts of omission (*ibid.*, Bankes L.J. and Warrington L.J. in the Court of Appeal). For illustrative cases see *post*, p. 94.

CONSEQUENCES INTENDED

If the defendant actually *intended* the consequences, the question of remoteness is immaterial—nothing can be too remote which was intended. If, however, the intervening act of a third party be malicious or of an intentional character, then it does become a superseding cause, unless the wrongdoer should have realized and appreciated the likelihood of its occurrence by reason of the situation created by him.

The position is the same in criminal law where, if the person threatening the deceased intends some harm, although not her death, he will be held liable for culpable homicide if she falls and dies when fleeing from his unlawful threat of assault (*R. v. John*, 1969 (2) S.A. 560 (R.A.D.)). Moreover the doctrine of *aberratio ictus* will not apply where the offender should, not must, have foreseen the results of his actions (*R v. Mabena*, 1968 (2) S.A. 28 (R.A.D.) at 35).

(For illustrative cases see *post*, p. 96).

CERTAINTY ESSENTIAL

Apart from any question of intervening cause, it is of course essential that it be clearly established that the defendant's wrongful act did cause the damage. A particular case which in the past raised difficulty in this connection is that of nervous shock.

EMOTIONAL OR NERVOUS SHOCK

It was at one time held in England that the physical results of nervous shock, caused by the defendant's negligence, were too remote. But that view has long been abandoned (*Hay (or Bourhill) v. Young* [1942] 2 All E.R. 396, [1943] A.C. 92), and was never the law in South Africa. The question is now recognized as one of certainty. If it can be established that certain **physical consequences** have followed upon a shock, admini-

stered to the plaintiff by defendant's fault though without actual physical contact, damages can be recovered for those physical consequences (*Hauman v. Malmesbury D.C.*, 1916 C.P.D. 216). The only difficulty still felt is as to whether the damage will be too remote if the shock was one caused by **fear of injury**, not to the plaintiff herself but to her husband or children. In *Mulder v. South British Insurance Co., Ltd.*, 1957 (2) S.A. 444 (W), it was held that a person suffering from shock or fright as a result of seeing or hearing an accident caused by the negligent driving or use of a motor vehicle is not, in general, entitled to recover damages in the absence of apprehension of personal danger to himself. Again in *Sueltz v. Bottler*, 1914 E.D.L. 176, it was ruled that harm caused by the shock of seeing an accident to a husband was too remote; following a dictum to that effect in *Dulieu v. White* [1901] 2 K.B. 669. In *Hambrook v. Stokes Bros.* [1925] 1 K.B. 141 the English Court of Appeal, by a majority, laid it down that damage would be recoverable which was caused by shock due to reasonable fear of immediate personal injury either to the plaintiff herself or to her children; provided it resulted from what she herself saw and not from what she was told by a third party. In *Schneider v. Eisovitch* [1960] 1 All E.R. 169 (Q.B.) at 175C, however, Paul J. held that 'there is no material difference between seeing and hearing' and awarded damages accordingly; but not for subsequent nervous state. The better and more acceptable view, however, is that it must be proved that the person shocked must have been in a position in which it can be said that a duty was owed to her by defendant—in other words that the defendant should have foreseen the possibility of shock to the plaintiff (*King v. Phillips* [1953] 1 All E.R. 617 (C.A.)). See also *Owens v. Liverpool Corp.* [1959] 1 K.B. 394 at 398.

Cases

Hambrook v. Stokes Bros. (*supra*) was considered in *Mulder's* case (*supra*), where it was decided that there may be exceptions to the general rule propounded above, but the facts in *Hambrook's* case will not generally be accepted as constituting an exception.

This case should be compared with the decision in *Layton & Layton v. Wilcox & Higginson*, 1944 S.R. 48, where the defendants, having operated on a child without obtaining the plaintiff's consent, were sued for shock caused to the mother as a result of the death of the said child while under anaesthetic. Held, that while the defendants were negligent in not obtaining the father's consent, they were not so negligent in failing to obtain the consent of the mother, and, since no duty was owed to her, her claim could not succeed. This seems a hard case.

In *Hay (or Bourhill) v. Young* [1943] A.C. 92, the plaintiff, a pregnant fishwife, was taking a basket of fish from off a bus when Young drove past in a negligent manner and collided with a motor-car. She received a shock and miscarried as a result. Held, that such result could not reasonably and probably be anticipated. Per Porter, at 199: 'In order, however, to establish a duty towards herself the appellant must still show that the cyclist should reasonably have foreseen emotional injury to her as a result of his negligent driving.'

In *King v. Phillips* [1953] 1 All E.R. 617 (C.A.), it was held that a motorist was not liable for the shock caused to the mother of the child (into whom he had backed his vehicle) on the ground that the injury to the mother was not within the area of potential danger as would be covered by his negligence. In other words he could not reasonably foresee damage to her.

It seems that in English law only physical results resulting from the mental fright can be a ground of damage; not the nervous shock itself

(*Mayne on Damages*, 11th ed., p. 58). No doubt, however, on the score of certainty, the courts would require proof of *physical injury* to have resulted before ground of action would be allowed. See, however, Millner in (1957) 74 *S.A.L.J.* 263, who submits that there may be appropriate cases in which damages for shock may be awarded.

Two useful articles on damages for nervous shock in England and America will be found reprinted in (1925) 42 *S.A.L.J.* 345 and (1926) 43 *S.A.L.J.* 290. See also *Marshall v. Southern Insurance Assn.*, 1950 (2) P.H., J. 6 (N).

REMOTENESS IN PARTICULAR CASES

The chapter on Damages deals with the damage recoverable in respect of loss of chattel, personal injury, loss of spouse or *pater*, etc. (see *post*, p. 250).

CLASSICAL AUTHORITIES

Inst. 4.3.10: *Damnum* under the *lex Aquilia* includes consequential loss, both *damnum emergens* (e.g. loss caused by an animal being one of a team) and *lucrum cessans* (e.g. loss caused by the killing of a slave who had not yet adiated under an inheritance to which he was heir). cf. Dig. 9.2.23 pr.

Dig. 9.2.29.3: In an action for destruction of nets, damage for loss of fish which might have been caught is not recoverable, as being too uncertain.

Voet 9.2.11: For injury to a free man, damages include medical expenses, and the value of services which he has been unable to perform and will be unable to perform in future; also something on account of deformity, scars, and suffering. Voet 9.1.1: For injury to crops, hoped-for gain, including the value the crops would have had if they had matured.

Voet 9.2.19 *in fin.*: 'Generally, he is liable who by his *culpa* has provided the cause of a fire, even if later it spreads more widely and causes damage to nearer and to more remote neighbours; for there is no doubt that he is liable for all loss flowing from [*profluente ex*] the first proved *culpa*' (citing Gail, bk. 2, obs. 22; Grot. 3.38.3, *Respons. J. Holl.*, 1.256). See, however, Van der Keessel, *Th.* 809.

Voet 9.2.16: 'Damage does not include that which supervenes from a new cause, even though the occasion is provided by the former (*culpa*); on which principle, when by collision a ship was so damaged that it could not keep up with the fleet and so was taken by pirates or the enemy, the Supreme Court held that the damage to the ship's equipment was recoverable, but not that caused by the capture by pirates: as Groenewegen tells us in a note to Grot. 3.38.16.' Schorer's note is to the same effect. Bynkershoek discusses the case fully (*Quaest. Jur. Privati*, 4.22), and thinks the damage recoverable, since to damage a ship so severely in waters infested with pirates is in effect to destroy the ship. Van der Keessel (*Th.* 814) agrees with Bynkershoek. It will be observed that Voet expressly refers to a *nova causa*. The language of Bynkershoek can be used to support either the test of foreseeability, or the test of direct causation.

Windscheid (vol. 2, sec. 258, n. 14), Dernburg (sec. 302, n. 7) and Thayer (on Dig. 9.2.52 pr.), all cited by McKerron (*Delict*, p. 158), seem to show that the German civilians favour the test of direct causation.

Voet 9.2.9: If A wounds a slave, and B kills him, is A liable for killing or only for wounding? Voet quotes the various passages in the *Digest*, as to which Buckland (*Roman Law*, p. 582) says that 'it is generally held that they are irreconcilable'. Voet's view is that if the wound given by A either was not mortal, or was not certainly mortal, A is liable for wounding only; but that if it was mortal beyond any doubt, he is liable for killing.

ILLUSTRATIVE CASES

Foreseeability

S. v. Van der Mescht, 1962 (1) S.A. 521 (A.D.): The accused was unlawfully heating gold amalgam, during which process a poison gas was given off, giving no warning odour, with the result his companion and four children were killed by mercurous gas. Held that such fatal consequences were unknown to him and were of such rare occurrence as not to have been foreseen by a *bonus paterfamilias*. Held, that there was no guilt nexus, that the doctrine of *versari in re illicita* did not apply, and that the decision in *R. v. Matsepe*, 1931 A.D. 150, was wrong and that the conviction for culpable homicide, should be set aside.

Wilson v. Birt, 1963 (2) S.A. 508 (D): While dismantling a building defendant, being engaged in an intrinsically dangerous pursuit, should have taken care to see that a pole should not have fallen upon the plaintiff, who sustained minor injuries but thereafter suffered attacks of epilepsy to which he was prone. Also, that the defendant must take the victim as he finds him and, on the 'thin skull rule' was liable for all consequential damages suffered by plaintiff.

Ocean Accident & Guarantee Corp., Ltd. v. Kock, 1963 (4) S.A. 147 (A.D.): Plaintiff was in an advanced state of coronary artery disease at the date of the collision and it was contended, on appeal, that the award in respect of thrombosis should not have been allowed since it had occurred four months later. Here there was a direct conflict of medical opinion but no scientific proof either way that the heightened state of anxiety of the plaintiff was the cause of his thrombosis, although the injury to his neck had set up the state of his sustained anxiety.

S. v. Fernandez, 1966 (2) S.A. 259 (A.D.): The appellant had kept a baboon in a small cage from which it escaped, and whilst busy in the process of recontaining it in the said cage, the animal escaped. It then snatched a baby from a perambulator, bit it and threw it to the ground. Held that the appellant must have foreseen the likelihood of the animal's escaping and making an attack upon somebody and that he had rightly been convicted of his negligence in causing the death of the baby.

S. v. Bernardus, 1965 (3) S.A. 287 (A.D.): Appellant had been convicted of culpable homicide in throwing a stick at the deceased when 9 to 12 yards from the latter. The stick penetrated the temple of the deceased to a depth of 4 to 5 inches. Held that the appellant should have realized that such an assault could possibly be dangerous to life and that the conviction should be confirmed.

R. v. Nemashakwe and others, 1967 (3) S.A. 520 (R.A.D.): In considering an intention to kill, the test whether a *socius criminis* foresaw the possibility that the act in question, in the prosecution of a common purpose, involved some risk to life, depends upon his own *mens rea* and foreseeability. In this case certain terrorists had invaded Rhodesia with the common purpose of disrupting the European régime, and it was held that there was no foresight that one of them would shoot and kill an innocent Bantu driver of a motor vehicle.

R. v. Tatham, 1968 (3) S.A. 130 (R.A.D.): The driver of a tractor negligently permitted the deceased to ride precariously on the rear mudguard thereof. Whilst so riding the deceased's knobkerrie, which he carried through his belt, became entangled with the wheel of the vehicle, causing him to fall off and under the wheel thereof. Held that, since it was an offence for a driver of a motor vehicle to permit any person so to ride as he did (section 24 of the regulations), and since he should have foreseen the possibility of such fall, the appellant had rightly been convicted of culpable homicide.

R. v. John, 1969 (2) S.A. 560 (R.A.D.): After a quarrel in which the appellant and his deceased wife fought each other, the deceased ran to the house of the appellant's father and, finding no one at home, then proceeded to run in the direction of her parent's kraal. The appellant then pursued her in order to head her off, but before he caught up with her she fell into a deep pool alongside the path and died either from shock or drowning. Held, that, in pursuing a person fleeing away in terror, it is foreseeable that he would fall down and injure himself and that the appellant had rightly been convicted of culpable homicide, since he should have seen the reasonable possibility of some risk to life involved in his action.

Was the defendant negligent?

Colman v. Dunbar, 1933 A.D. 141: Action for damages caused by the falling of a prop supporting temporary shuttering for a concrete verandah overhanging a public street. Held, there was no liability, since the prop was safe when erected, was in order when work was discontinued on the Saturday, and must have become loosened by some outside agency thereafter. Per Wessels C.J. at 157: 'If the circumstances are such that a person of common sense who has the custody or control of a certain thing could recognize that it is likely to be a danger to others, then it is his duty to take reasonable care to avoid such injury.' But, at 156: 'It is difficult to see on what principle a builder who uses reasonable care against likely accidents can be held responsible if third parties, over whom he has no control, so interfere with what was reasonably safe as to make it unsafe.' The judgment appears clearly to contemplate, that if the interference was one which should have been foreseen and guarded against, there would have been liability.

Joffe & Co. v. Hoskins and another, 1941 A.D. 431: The first defendant, a firm of engineers, had designed a concrete hood. The second defendant, a firm of contractors, was responsible for the fixing of the steel and the concrete in the correct position. The hood collapsed killing a plumber who was working under the hood, and his widow claimed damages. Held, that the collapse was due to the negligence of the foreman of the contractors in failing to exercise proper supervision over the workmen as they concreted the reinforcing steel rods. The engineers were not entitled to assume that the contractor's foreman would be competent, and that they were therefore under a duty to take precautions in order to ensure that the rods were kept in their correct position, either by fixing the steel so as to prevent its becoming displaced, or by supervising the concreting, and that their failure to do so constituted negligence.

Berlin V.M.B. v. Richter, 1929 E.D.L. 59: Action for loss of cattle. Appellant board controlled a dipping-tank, which was fenced off from the commonage, and a settling-tank which was not. The tank was fed through a stop-cock which was exposed to possible interference. Some malicious third party interfered with the stop-cock, with the result that polluted water flowed from the dipping-tank into the settling-tank, where plaintiff's cattle drank it. Held that the board was liable for the death of the cattle. Per Pittman J.: '... the Board was setting in motion an operation that, unless due measures be taken, must needs be attended with considerable risk of injury to property. Such measures must include ... reasonably sufficient precautions against wilful interference.' The decision, on the question of negligence, falls therefore within the class relating to *dangerous things*. The question whether the malicious interference constituted a *novus actus interveniens* is not expressly dealt with in the judgment. The Court referred to *Foster v. Moss & Dell* (below).

Foster v. Moss & Dell, 1927 E.D.L. 208: Two years before the accident, defendants dragged their gate back from the road and fastened it to the fence with wire. Thereafter, either by human agency or by action of the weather, a portion of the gate became loose and projected into the road, where plaintiff's car collided with it and was damaged. Held, that defendants were liable: they should have foreseen that the gate might become loose either by operation of the weather, or by the action of travellers who were endeavouring to carry out their statutory duty to close it. Whether the test of foreseeability or of direct causation was adopted, the damage was not too remote: since 'the kind of damage suffered was exactly what defendants should have expected would occur' (per Pittman J. at 217). (The argument contains a full citation of authorities.)

Clairwood Motor Transport Co. v. Akal & Sons, 1959 (1) S.A. 183 (N): Motorist travelling on a road at a reasonable speed and child, not previously seen by him, suddenly dashing across the road. Held, no negligence.

The test of remoteness

Steenkamp v. Steyn, 1944 A.D. 536: A head-on collision having occurred between cars on a country road it was ruled that though the plaintiff drove with only one headlight, had failed to keep a proper look-out and had failed to dim his headlights, yet the real and decisive cause of the collision was the negligence of the defendant in driving on the wrong side of the road at an excessive speed.

Duncan v. Cammell, Laird and others [1946] P.C., cited (1946) S.A.L.J. 407: The defendants had been found to have been guilty of negligence in that they had failed to discover a defect in the submarine's test-cock caused by their subcontractor's servant and the House of Lords agreed that whatever the degree of the negligence of the defendant company, that negligence was not responsible for the calamity.

Pietersburg Municipality v. Rautenbach, 1917 T.P.D. 252: The municipality, in breach of Ordinance 5 of 1912, failed to provide hitching-posts to a gate. Plaintiff opened the gate with one hand and led his horses through with the other; the horses bolted and were injured. Held, that the municipality was liable.

Frenkel & Co. v. Cadle, 1915 N.P.D. 173: The defendant lit a fire in his veld and left it to burn unattended. It spread and damaged plaintiff's plantation. Defendant pleaded, *inter alia*, that the damage was caused by inevitable accident, because he had established a 40-foot fire-path, and he could not have anticipated that a fire would leap the path. Per Dove-Wilson J.P. at 184: 'There is high authority for the view that if the lighting of the fire was in itself negligence, and the burning of the plaintiff's plantation is the natural and direct result of that negligence, it is quite immaterial whether that result was one which the defendant could be reasonably expected to have foreseen or not' (citing *Smith v. L. & S.W. Railway*, L.R. 6 C.P. 14). This case should be contrasted with *Fourie v. Sang*, 1924 O.P.D. 153, where the existence of a fire-path was considered to be reasonably sufficient to negate negligence.

Negligence sine qua non and causa causans

Barclays Bank D.C.O. v. Straw, 1965 (2) S.A. 93 (O): A customer of a bank, being busy with a new pump and finding his hands greasy, had requested the payee to fill in his cheque for R1. This the latter did, leaving a space of about one inch between the words 'een' and 'Rand' and also a space between the figure 1 and the noughts. The payee then fraudulently filled in the cheque for R1,000. Held that although the customer had been negligent in some degree, the *causa causans* of the defendant bank's loss was due to the negligence of its servants in failing to see the addition of the word 'duizend' in compressed writing and in different ink and also in allowing plaintiff's overdraft facilities to be exceeded by some R400. For both these reasons the bank's clerks should first have contacted the plaintiff before paying the sum of R1,000 over the counter to the holder of the cheque.

Intervening act

Venter v. Smit, 1927 C.P.D. 30: In reconvention, defendant alleged that plaintiff threatened, and commenced to outspan, the horses attached to defendant's cart, thereby causing defendant's wife to dismount, in which act she was injured. Held, that the damages were not the direct result of the acts alleged, 'because in between the two there comes the independent act of the wife. She decided that it is better for her to get off the cart. She does not jump off through fear; if she had, the position might have been different. She made up her own mind. Her injury [rupture] was an accidental result of her own deliberate act' (Watermeyer J. referred to *In re Polemis*, but found it unnecessary to discuss it.)

Anderson v. Van der Merwe, 1921 C.P.D. 343: Defendant wrongfully interfered with plaintiff's sheep, which his herds were driving along a public road. The herds left the sheep, which strayed and were impounded. Held, defendant was not liable. 'It was purely a voluntary act on the part of the herds, and that was the direct cause of their straying. Consequently the items allowed . . . cannot be said to be the natural, ordinary or direct consequence of the wrongful act' (per Kotzé J.P.).

Verster v. Vice, 1946 O.P.D. 247: The plaintiff was travelling in a motor-car over the defendant's ground which, although not a public road, was habitually used by the public as a motor road. Defendant had made an excavation for the foundations of his house, a corner of which protruded over this road. In the evening the son of the plaintiff drove plaintiff's motor-car over the road and ran into the excavation with the result that a stone struck the oil-sump of the car causing the oil to drain away. The son heard the sound causing the damage, but thought that the tyre had gone flat and continued to ride on. A mile further on he heard a peculiar noise emanating from the engine, but nevertheless continued to ride on. He never looked at the oil-gauge. Held,

that the action of the son was an intervening cause of the burning out of the car engine and that the judgment of the magistrate for the value of the oil lost only was correct.

Kruger v. Van der Merwe and another, 1966 (2) S.A. 266 (A.D.): Where the intervening act of another could have been foreseen by an overtaking car, the actor will be liable.

See also *Colman v. Dunbar*, 1933 A.D. at 150; *Berlin V.M.B. v. Richter*, 1929 E.D.L. 59, and *Foster v. Moss & Dell*, 1927 E.D.L. 208 (digested *supra*, pp. 33 and 95).

Certainty

Kotze v. Johnson, 1928 A.D. 313: Even though a messenger may have been negligent in not taking proper steps to secure the safety of cattle taken in execution, he will not be liable unless it is proved that the loss is due to such negligence. Where, therefore, it was not established that at the date at which the cattle would ordinarily have been sold (fourteen days after attachment) they were not available, and where it was not the fault of the defendant (who had then relinquished his office) that they were not then sold, held that the defendant was not liable.

Perlstein v. Table Bay Harbour Board, 12 C.T.R. 668: Where defendant's traction engine damaged plaintiff's boarding-house, and some of his boarders left, it was held that defendant was not liable for this head of damage, in the absence of proof that the boarders *had* to leave.

Illustrative English cases

Rickets v. Erith Borough Council [1943] 2 All E.R. 629: The seller of pieces of bamboo to a child is not liable if that child makes a bow and arrow and discharges the arrow at another child, nor are the school authorities liable therefor.

Glasgow Corp. v. Muir [1943] 2 All E.R. 44: An urn of scalding tea let fall by a child injuring other children at a church picnic party. Held, that the manageress of the tea-room could not possibly have foreseen such contingency.

Scott v. Shepherd, 2 W. Bl. 892: A dangerous squib thrown from hand to hand. Held, the original thrower was liable for ultimate injury.

Clark v. Chambers, 3 Q.B.D. 327: A dangerous obstruction was wrongfully put by defendant in roadway, and moved by third person to sidewalk, where plaintiff was injured. Commented on in *Weld-Blundell v. Stephens* [1920] A.C. at 988; perhaps a case of 'continuing negligence'.

Sharp v. Powell, L.R. 7 C.P. 253: See text *ante*, p. 86.

Hill v. New River Co., 9 B. & S. 303: Stream of water in street frightened horses into open excavation made by third parties. The defendant company who caused the stream was held liable.

Romney Marsh Bailiffs v. Trinity House, L.R. 5 Ex. 204: See text, *ante*, p. 87.

H.M.S. London [1914] P. 72: Delay in repair caused by a strike included in damage or injuring a ship.

Dominion Natural Gas Co. v. Collins [1909] A.C. 640: Defendants installed a gas machine, and omitted the precaution of having the regulator outside the building. Held 'hat they were liable for an explosion, unless they could show that it was caused by the fact of a subsequent conscious volition', e.g. tampering by third parties.

Harnett v. Fisher [1927] 1 K.B. 402: If a doctor negligently certifies a patient insane, the resulting committal order by a justice does not break the chain of causation, and he is liable in damages. But in *Harnett v. Bond* [1924] 2 K.B. 517, [1925] A.C. 669, the chain is broken by the acts of doctors who in performance of statutory duties re-examine and re-certify the patient. (The distinction is a difficult one; the decision in *Fisher's* case is on this point that of *Horridge J.* alone, though on another point the case went further (see [1927] A.C. 573).)

Weld-Blundell v. Stephens [1920] A.C. 956: Plaintiff sent a letter to defendant containing libels on certain individuals. Defendant's partner negligently left it lying in the office of a third party, who showed it to the persons libelled. They recovered damages from plaintiff. Held, by a majority of three to two, that the plaintiff should not have succeeded in his action because the damage was too remote from the original negligence.

S.S. Paludina v. S.S. Singleton Abbey [1927] A.C. 16: By the negligence of ship A, ship B was caused to bear down upon ship C (plaintiff). Held on the facts (by a majority), that the deliberate act of ship C, in causing her propeller to revolve, was a *nova causa* and the proximate cause of the harm to ship C, even if such act was not negligent (see the judgment at 22-7, 32).

Bottomley v. Bannister [1932] 1 K.B. 458: Where defendants install a gas-heater which is not dangerous if properly regulated, and they have nothing to do with the regulating, they are not liable if, after the regulator has been properly set by the gas company it is altered to a dangerous position by the tenant. (Many of the dicta in this case are subject to doubt since *M'Alister v. Stevenson* [1932] A.C. 562.)

CHAPTER V

MASTER AND SERVANT

SUMMARY

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GENERAL RULE

The master is liable at the suit of a third party for all damage caused by the wrongful act of his servant, whether wilful or negligent, committed in the course of the servant's employment, bearing in mind that an act done by a servant, solely for his own interests or purposes and outside his authority, does not impose any liability on his master (*Jensen v. Williams, Hunt & Clymer, Ltd.*, 1959 (4) S.A. 583 (O) at 589; *Mkize v. Martens*, 1914 A.D. 382 at 391). The liability is *in solidum*; the servant is also liable to the third party for his own delictual acts (*Botes v. Van*

Deventer, 1966 (3) S.A. 182 (A.D.) at 199); (*Marona v. Blackbeard*, 21 S.C. 436); and the master has his remedy over against the servant, at any rate in the case of negligent acts, to which the defence of express authority can never apply. The liability of the master remains even if the plaintiff is the wife of the negligent servant who is suing the master on the grounds of the master's vicarious responsibility for his servant's negligent actions (*Broom v. Morgan* [1953] 1 All E.R. 849 (C.A.)). The position appears anomalous inasmuch as the negligent husband would indirectly be allowed to profit by his own negligence at the expense of the defendant, but, in the absence of any evidence to show that she was associated with the negligence of her husband, she is nevertheless entitled in our law to sue for damages caused to her **own person** (*Pretoria Municipality v. Esterhuizen*, 1928 T.P.D. at 683. See also *Strydom v. Saayman*, 1949 (2) S.A. 736 (T), and *ante*, p. 75).

The liability of the master is not limited to such acts as are reasonably necessary to carry out the master's orders, but includes all acts done which the servant was engaged upon in the affairs of his master (*Union Govt. v. Hawkins*, 1944 A.D. 556). The reason for this rule, as given by Voet 9.4.10, that the master is to blame for having appointed a negligent person to do his work is, as was pointed out in *Hawkins's* case on appeal (1944 A.D. at 562), not a very satisfactory one, but has, nevertheless, been accepted in our courts in many cases (see *Ables Groceries (Pty.) Ltd. v. Di Ciccio and another*, 1966 (1) S.A. 834 (T)).

The main objection is that, if this were the basis of liability, then the master could escape responsibility by proving that he had exercised care in the selection of his servants, and this, of course, is no proper defence. The seven bases of liability, namely (a) Selection, (b) Control, (c) Difficulties of Proof, (d) Guarantee, (e) Recompense, (f) *Qui facit per alium facit per se*, and (g) the Theory of Risk, are discussed by the author in *Master and Servant in S.A.*, pp. 257-8. (See also *post*, p. 103.)

The liability is in respect of a *servant*; and of a servant acting *in the course of his employment* (*Weir Investments (Pty.) Ltd. v. Paramount Motor Transport*, 1962 (4) S.A. 589 (D), and see *post*, p. 113). There may be some strictly limited liability for the delicts of *agents who are not servants* since there may be a liability in respect of some acts even though they have been delegated to an *independent contractor*. These limited liabilities are examined *post*, pp. 101, 123. It is necessary therefore to consider, first, who is a servant; and second, what is meant by the 'course of employment'.

WHO IS A 'SERVANT'

'A servant is a person subject to the command of his master as to the manner in which he shall do his work'; 'the relation of master and servant exists only between persons of whom one has the **order** and **control** of the work done by the other. A master is one who not only prescribes to the workman the end of his work but directs, or at any moment may direct, the means also . . . ; and he who does work on these terms is in law a servant' (*Pollock on Torts*, 12th ed., p. 79, approved in *Colonial Mutual Life Assurance Soc. v. MacDonald*, 1931 A.D. 412). 'The essential feature of the relation is that the master has the right to control the servant even in details, and to direct not only the work which is to be done, but the **manner**

in which the servant is to do it' (Welford, *Accident Insurance*, p. 448, approved *MacDonald's* case, *Fisk v. London & Lancashire Ins. Co.*, 1942 W.L.D. 63).

In determining whether this relationship exists, there are many factors which may be of some assistance to the court; for example, 'the nature of the task, the employee's freedom of action, the magnitude of the contract amount, the manner of payment, the powers of dismissal or of withholding payment' (per McCordie J. in *Performing Rights Soc. v. Mitchell* [1924] 1 K.B. 762 at 767); but 'the final test, and certainly the test to be generally applied, is the nature and **degree of detailed control**. This . . . is usually of vital importance' (ibid.). In other words, the characteristic of the relationship is that the master has the power to direct the servant both as to **what he is to do** and as to **how he is to do it**, and this in detail; and in deciding whether the relationship exists, the factors mentioned may, all or any of them, assist the court in determining whether that characteristic is present (cf. *Auto Protection Ins. Co., Ltd. v. McDonald (Pty.) Ltd.*, 1962 (1) S.A. 793 (A.D.) (a taxi-driver declared a servant), and compare *Oosthuizen v. Webb and Kruger*, 1947 (2) S.A. 670 (O)).

It is not essential that the control should be actually exercised; its actual exercise will frequently (in fact usually) be impossible at any given moment; but the relationship must be such that control **can** be exercised—that if the master gives orders the servant is bound to obey them.

Nor is **payment** essential. As will appear, those who gratuitously do work for others subject to control may be 'servants' within the rule. Neither is it necessary for the plaintiff to prove a particular **contractual relationship** subsisting between the parties for a person may be the *de facto* servant of another as was instanced in *Mkize v. Martens*, 1914 A.D. 382, where it was ruled that the son was the servant of the father. For the assumption of a *de facto* servant in regard to the control of vehicles, see *post*, pp. 102–6.

(a) INDEPENDENT CONTRACTOR DISTINGUISHED

The essential difference is that a servant is subject to his master's instructions, not only as to **what** he shall do, but **how** he shall do his duties, while an independent contractor is directed only as to the nature of the work to be done, the **actual method of his performance being within his own discretion** (*Dukes v. Marthinusen*, 1937 A.D. 12 at 17; *Honiwell & Stein v. Larkin Bros.* [1934] 1 K.B. 196). As *Salmond on Torts*, p. 90, points out, the test is one of **control**; an independent contractor is one who is his own master, who contracts to perform a particular job. See *Performing Rights Soc. v. Mitchell* [1924] 1 K.B. at 767; *Imperial Cold Storage v. Yeo*, 1927 C.P.D. 432; *Oosthuizen v. Webb*, 1947 (2) S.A. 670; *Murray & Stewart v. R.*, 1950 (1) S.A. 154 (C), and the *Auto Protection Ins. Co.* case (*supra*).

(b) AGENTS

As regards agents, an agent may, or may not, be a 'servant' within the rule. If, in fact, he is subject to the detailed control of his principal, he is a servant; if he is not so subject, he is not (*MacDonald's* case, *passim*). It seems clear that the same employee may be a servant of his employer in respect of some acts, but not in respect of other acts. (See *post*, p. 127.)

Illustrative cases

Colonial Mutual Life Assn. v. MacDonald, 1931 A.D. 412: Plaintiff was injured by the negligence of an insurance agent employed by the defendant company. The agent was remunerated by commission; his car was sold to him by the company on condition that he used it exclusively on the company's business; the company insured the car; he was subject to no control as to time or method; he was free to obtain proposals or not as he pleased. At the time of the accident he was returning from a trip in which he had taken the plaintiff to examine a proponent. Held, that though an agent he was not a 'servant', and that the company was not liable for his negligence in the driving of the car.

Fisk v. London & Lancashire Ins. Co., 1942 W.L.D. 63: A branch auditor, who is paid on a monthly basis and employed continuously is not a servant since the instructions given to him in regard to his duties were rather in the nature of suggestions open to the plaintiff to accept or otherwise.

The Hibernian (1872) L.R. 4 P.C. 511: Where a pilot is by compulsion of law employed on board a vessel he cannot be regarded as the servant of the owner, and the owner is consequently not liable for his negligent acts. If, therefore, the owner can prove that the ship was managed according to the pilot's directions and that the crew did not contribute to the accident by their acts, he will not be liable. See also *The Halley* (1868) L.R. 2 P.C. 193.

Union Govt. v. Lombard, 1926 C.P.D. 150: Buchu pickers were employed on piece-work, on terms that all buchu picked must be delivered to the Government against payment of 6d. per lb. The method of picking was controlled by the forester. Held, they were servants and that the Government was liable for their trespass.

Imperial Cold Storage v. Yeo, 1927 C.P.D. 432: An ice-cream van supplied by defendants was driven by an agent who signed a daily contract termed 'commission contract', which did not prescribe either hours or route. The remuneration was by way of commission, but was paid weekly. The agent had to wear a uniform. Held, he was a servant and that the contract in some respects was a 'subterfuge' as the defendants had the right to control. This is a doubtful decision, unless founded on the principle, *plus valet quod agitur quam simulate concipitur*.

Reid v. Bouverie, 1914 N.P.D. 203: A Native was employed to cut scrub for a fixed amount. Held, he was a servant, it being immaterial that no control was actually exercised.

Addis v. Schiller & Co., 1906 T.H. 210: Defendants, under contract to erect a gas-generator, employed S to do the work. S had no workshop of his own; was not in full-time employ of defendants; but had been employed by them on similar work almost continuously for three months; his remuneration was put to wages account. Held, that he was a servant.

Performing Rights Soc. v. Mitchell [1924] 1 K.B. 762: A jazz band was employed to play daily for seven hours at a *palais-de-danse*. The contract spoke of 'services' and 'wages' and provided for control in some respects, e.g. of what music was to be played. Held, that the members of the band were 'servants' and that the employer was liable for breach of copyright.

Weir Investments (Pty.) Ltd. v. Paramount Motor Transport, 1962 (4) S.A. 589 (N): Where a bus-driver negligently left the keys of the bus in the vehicle with the result that the conductor, an unqualified driver, was able to go off with the bus and cause damage to the plaintiff, it was held that the employer of the bus-driver was liable for the damages caused.

(c) OWNER-PASSENGER AND FRIEND DRIVER

In so far as a servant, acting in the course of his employment and within the scope of his authority, is concerned (see *post*, p. 113), there can be little difficulty in imputing to his employer, or master, a vicarious liability for damages caused by him, as a driver of a motor vehicle (*Archibald & Co. v. Sabela*, 1953 (1) S.A. 254 (N)), particularly when the employer is

present in the vehicle at the time (*ibid.*), but when the driver is the friend or deputy of the owner-passenger no inconsiderable difficulty has arisen.

The leading case in this regard is that of *Samson v. Aitchison* [1912] A.C. 844 (H.L.), which has been followed in a larger number of cases in South Africa. The facts there were that the owner of a motor-car had allowed the son of a potential purchaser to drive it on a test run with the owner of the car sitting next to the driver and giving him directions how to drive (at 848). An accident ensued and, although the trial judge was of the opinion that the damage was not caused through 'any actual personal negligence' on the part of the appellant owner, the jury found in favour of the plaintiff, Aitchison. On appeal, however, it was held that the owner of the vehicle, while riding in the car, 'retains the power and right of controlling the manner in which it is driven unless he has, in some way, contracted himself out of his right or is shown by conclusive evidence to have, in some way, abandoned his right.' Lord Atkinson continued to observe that, if the driver failed to obey the owner's instructions, the latter could compel the former to hand over the driving-wheel, as where the driver is travelling at a dangerous speed.

This decision has been followed in South Africa in a number of cases, namely *Bruce v. Lomnitz*, 1922 C.P.D. 343; *Ringrose v. Hunter*, 1933 N.P.D. 442; *Van Blommenstein v. Reynolds*, 1934 C.P.D. 265; *Slabbert v. Holland*, 1936 N.P.D. 238; *Abdool v. Slade*, 1931 N.P.D. 4.

Basis of liability

Various grounds have been advanced as to the basis of the decisions imposing liability to the owner-passenger of the vehicle, the driver of which is alleged to have been negligent by the plaintiff suffering damages from such *culpa*, such as:

Negligence? While it is axiomatic that the owner-passenger of a vehicle may be castigated as being negligent when he allows an incompetent or unqualified person to drive his car (*Francis Freres & Mason* cases, 1964 (3) S.A. 23 (N)), and also when it is apparent to him, during the course of the journey, that the driver is a careless or incompetent one (as when the latter is driving at an excessive speed), it cannot always be said that the negligence of the driver *ipso facto* constitutes negligence on the part of the owner-passenger since, in most cases, accidents happen in an incredibly short space of time, as where the driver suddenly and unaccountably veers from his side of the road to his right in the face of approaching traffic or applies his brakes too suddenly on a slippery road. Moreover it is clear that liability is for **personal, not vicarious, negligence** (*Cassiem and another v. Rohleder and others*, 1962 (4) S.A. 739 (C)). In this case the owner-passenger was engrossed in reading a newspaper and it was held that there had been no negligence on his part. (See also *Boberg* in (1962) 79 S.A.L.J. at 238.)

Agent or Servant? In *Ormrod and another v. Crosville Motor Services, Ltd. and another* [1953] 2 All E.R. 753 (C.A.) both the trial judge and Singleton L.J., on appeal, found liability on the part of the owner-passenger on the basis of agency and, in *Abdool v. Slade* (*supra*), Hathorn A.J. linked these two categories together; nor could Lansdown J., in *Slabbert v. Holland* (*supra*), see any difference between the two in this respect (at

242). It is submitted, however, that while there can be no question of a **servant's** attracting liability to his master (while acting in the scope of his employment and within the scope of his authority), a principal is not liable **in delict** for the actions of his **agent** unless the act was specially authorized by him or ratified by him (*Colonial Mutual Life Assurance Society v. MacDonald*, 1931 A.D. 412). This decision, which has never been overruled, makes it clear that it is only if such agent is **acting as a servant** that legal liability can be imputed to the principal. See also *Est. Van der Byl v. Swanepoel*, 1927 A.D. 141; *Van Blommenstein v. Reynolds*, 1934 C.P.D. 265 at 269, *post* p. 127; and McKerron in (1953) 70 *S.A.L.J.* 313 and in (1954) 71 *S.A.L.J.* at 240-1. Accordingly, the decision in *Ormrod's* case is an uncertain and unreliable guide to South African law (*S.A. General Investment & Trust Co., Ltd. v. Mavani*, 1963 (4) S.A. 89 (N) at 91).

There may be a presumption that the driver is the servant of the owner-passenger, but this is only one of the factors to be taken into consideration in deciding whether the master-servant relationship existed (*Archibald & Co. v. Sabela*, 1953 (1) S.A. 254 (N)). Thus, it has been held that where an agent has no power to delegate his mandate to another the principal cannot be held liable for the negligence of that other (*Ah Chow v. Rust*, 1945 E.D.L. 230, for the facts of which see p. 127, *post*); but the position is otherwise where the driver is a **servant** of the defendant (*Priestly v. Dumeyer*, 15 S.C. 393).

Ownership? Mere ownership of the vehicle concerned in a collision might raise some slight presumption of liability, but if the facts show that the servant was upon his own business (e.g. riding to the market on the master's bicycle in order to buy goods for himself) the master will not be liable (*Carter & Co. (Pty.) Ltd. v. McDonald*, 1955 (1) S.A. 202 (A.D.) at 208). See also *post*, p. 108.

Control? The main basis for ascribing liability to the owner-passenger rests on the assumption that he is 'in control' of the vehicle in question driven by his friend or deputy (*Pretoria Municipality v. Estherhuizen*, 1928 T.P.D. 678 at 681). In *Abdul v. Slade* (*supra*) Carter J. sought to illustrate such control by saying that the owner-passenger could cut off the ignition, or apply the handbrake (if on his side) or declutch, but Hathorn J. in *Ringrose v. Hunter* (*supra*) was not prepared to concur with this view and preferred the concept of the 'right of control' and not physical control as the dominating factor. The control aspect, for inducing liability, was also the basis of the decision in *Bruce v. Lomnitz* (*supra*), while Caney J., in *Manickum v. Lupke*, 1963 (2) S.A. 344 (N), found liability in the owner-passenger on the ground that he has not only the right to control but also the **duty** to control the manner in which the car is driven, a duty he could not rid himself of by falling asleep while travelling in the vehicle in question.

There must, however, be some reasonable limitations to the application of this rule, as was instanced in the decision of *Archibald & Co. v. Sabela* (*supra*). Here the owner was on an open platform at the back of his lorry and was completely isolated from its occupants in the driver's cab and it was decided that, since the driver (his son) was not his servant or his agent and was not upon the father's business, the latter, although present, was not 'in control' of the vehicle. This decision emphasizes the necessity

of investigating the peculiar circumstances of each particular case. Moreover, the right of control is not always a determining factor, as was illustrated in the decision of *Masinda v. Tower Typewriter Co.*, 1961 (1) S.A. 795 (N). In this case the owner of a motor-car was present in the car and had the right of control over a **pupil**, or **learner** driver, and Holmes A.J.P. (as he then was) held that this fact did not per se, in the **absence of negligence** by the owner (or a relationship of master and servant), render the owner liable for damages caused by the pupil's negligent driving.

In this regard Henning J. in *Paton v. Caledon Insurance Co.*, 1962 (2) S.A. 691 (D), said that the liability of the owner-passenger 'was based on the retention of control and not on any negligent act or omission of the owner and that it was not essential that the person who handled the vehicle should be either a servant or agent of the owner'. This dictum was criticized by Boberg in (1962) 79 *S.A.L.J.* 236, and was dissented from in *Cassiem and another v. Rohleder and others*, 1962 (4) S.A. 739 (C), as introducing a new basis of delictual liability, but it is submitted that the learned Judge was in effect merely predicating the inescapable conclusion resulting from the various judicial decisions in this regard as a *de jure* reality of responsibility of the owner-passenger, which comes very close to making him an insurer of the careful driving of his friend-driver.

Joint Venture? The fact that the journey was undertaken for the joint purposes of the owner-passenger and the driver was the basis of the decision of Denning L.J. in *Ormrod v. Crosville Motor Services* [1953] 2 All E.R. 753 (C.A.) at 754 and Fannin J. in *S.A. General Investment & Trust Co., Ltd. v. Mavaneni*, 1963 (4) S.A. 89 (D), an absence of which was one of the determining factors in *Cassiem and another v. Rohleder* (*supra*). But here, again, it may be questioned whether this principle is a correct basis for attributing liability to the owner-passenger, convenient though it may well be, since it savours of the *versari in re illicita* principle, which has been discarded in criminal law in *R. v. Church* [1965] 2 All E.R. 72 (C.A.); *S. v. Van der Mescht*, 1962 (1) S.A. 521 (A.D.) and *R. v. Gazembe*, 1965 (4) S.A. 208 (S.R.), where the principle is propounded that fault or negligence in one respect does not entail liability for *all* the results which follow but only for those results which 'ought to have been reasonably foreseeable'.

Driver 'in the Position of a Servant'? In *Van Blommenstein v. Reynolds*, 1934 C.P.D. 265, Watermeyer J. (as he then was) held that the friend of the wife of the owner of the car was 'in the position of her servant' and that, therefore, she was debarred from recovering damages due to his negligence. But surely this is stretching the legal concept of 'servant' too far. The duty of the judge is to interpret the law, not to make it, since the latter is the sole prerogative of the legislature. A servant is fundamentally employed for hire, wages or other remuneration and may be dismissed from service for his disobedience, but a driver-friend is not 'hired' in any sense of the term and may, in the vast majority of cases, be 'dismissed' from driving only when it is too late for the owner, or his wife, to instruct him on *how* to drive, that is, apart from speeding or where he has previously evidenced signs of his incompetence or recklessness. Moreover the aspect of 'instruction' would entail a considerable amount of what is commonly known as 'back-seat driving' which, as the experience of every motorist

shows, engenders such a degree of irritation and distraction in the mind of the driver as to make such practice, or exercise, positively dangerous to other road-users. In any case, why should the law be stretched so tenderly in favour of the plaintiff and so adversely against the owner-driver by a resort to the fiction of 'control', exercisable by a master over his servant, when section 11 of Act No. 27 of 1942 (as amended by section 3 of Act No. 27 of 1952), in providing that it is the **car** which is **insured** and not merely the driver thereof, ensures an adequate remedy to a third party for his damages?

Finally, the decision in *Van Blommenstein's* case presupposes an identification of the wife with the husband, a concept quite contrary to the decisions in *Steinbreucker v. Union Government*, 1947 (1) S.A. 832 (T), and *Pretoria Municipality v. Esterhuizen*, 1928 T.P.D. 678.

CONCLUSIONS AND SUBMISSIONS

From the foregoing it is possible to adduce certain relevant considerations in determining the liability of the vehicle owner for the negligence of the driver whom he has permitted or allowed to drive his vehicle, namely:

- (a) The basis of liability is *culpa*, which must be personal and not vicarious negligence.
- (b) While the master is liable for the acts of his servants while acting in the scope of and during the course of his employment, such liability, apart from fraud, does not attach to a principal for the acts of his agent unless the latter has been specifically instructed to perform the delictual act (i.e. to drive as fast as possible) or where the principal has ratified the act.

From these two precepts it follows that the following submissions may be made:

- (c) If the owner is present in the vehicle at the time of a collision he may be deemed, in the absence of any evidence to the contrary, to be in control of the vehicle, but whether such position of control entails liability on his part must depend upon the circumstances of each particular case, since the fiction of control alone does not per se attract absolute liability but only a presumption of one.
- (d) Where the owner is present in a vehicle, driven solely for the driver's purposes, there can be no assumption of joint venture and, even if there is some such joint venture, the fact that the latter, known by him to be a competent driver, had acted on the spur of the moment, or in an emergency, and was involved in a collision, should not, in the absence of other facts indicating *culpa* on the part of the owner, render him liable for negligence (*Masinda's* case (*supra*)).
- (e) Where the owner, being present in the car, has expressly or impliedly abandoned his rights of control to the driver, such owner would not normally attract liability for the driver's negligence unless he had prior knowledge that the driver was an inexperienced or an incompetent one. Such abandonment might be implied where a man, being dangerously ill, is being conveyed to hospital by his friend or where a repair-shop owner is, or is through his servant, driving the owner

to his place of business or home after the latter had deposited his vehicle at the former's workshop (*Chowdhary and another v. Gillo and others* [1947] 2 All E.R. 541 (K.B.), and see *post*, p. 120).

- (f) In view of the fact that the decision in *Samson v. Aitchison* (a) was made some fifty years ago, (b) was based on the English concept of the law of negligence, (c) was made before compulsory third party insurance was legislated for, it is possible that the Appellate Division may take a different view of the liability of the owner-driver based on our own Roman-Dutch precepts and law of negligence. Until such modification of the law is made, it is clear that practitioners must abide by the majority decisions that when the owner-driver is present in the vehicle in question, when it is driven by his friend on some joint purpose or enterprise, he will be liable for the latter's negligent driving unless he can surmount the difficult task of establishing that he had effectively abandoned his right and/or duty of control over the said vehicle.

Illustrative cases

Pratt v. Patrick [1924] 1 K.B. 488: Defendant was in his car which was negligently driven by a friend. Held, he was liable for negligence of that friend, there being no evidence of abandonment of right of control.

Bruce v. Lomnitz, 1922 C.P.D. 343: Similar facts.

Van Blommenstein v. Reynolds, 1934 C.P.D. 265: Plaintiff in car owned by her husband, driven by a friend on her business. Held, that the friend was her 'servant'. Per Watermeyer J.: 'The matter of the right of control is vital. The right of control remained with plaintiff.' Plaintiff was debarred from recovery by the contributory negligence of the friend.

Slabbert v. Holland, 1936 N.P.D. 238: Plaintiff, a passenger in a car owned by the joint estate and driven by his wife on his business, was injured by the joint negligence of his wife and defendant. Held, that the wife was a 'servant', plaintiff having right of control. 'The fact that the car was habitually driven by the wife for her own purposes is not sufficient to prove absence of control on the occasion in question.' Contrast *Pretoria Municipality v. Esterhuizen*, 1928 T.P.D. 678, where plaintiff, the wife, a passenger in a joint estate car driven by her husband not on her business, was held not to be 'identified' with his negligence.

Abdool v. Slade, 1931 N.P.D. 5: Defendant, a prospective purchaser, was taken for a trial run in the car, owned by plaintiff and at first driven by plaintiff's son. One R, who was advising defendant, took the wheel, with plaintiff's son sitting next to him. Held, that as plaintiff's son, on behalf of plaintiff, the owner, had retained control, and that the defendant did not assume control, defendant was not liable for the negligence (if any) of R. Compare *Samson v. Aitchison* [1912] A.C. 844, where on substantially similar facts control was placed in the owner.

Francis Freres & Mason (Pty.) Ltd. v. Public Utility Transport Corp., Ltd., 1964 (3) S.A. 23 (N): For a servant, who is a regular driver, to hand over the control of a motor vehicle to another person, whom he knows is not a competent or a licensed driver, is negligence for which his master is liable.

Criminal trials

In trials of a penal character the general rule is that only the person actually driving the vehicle in question is answerable unless there is evidence to show that the owner had an opportunity to prevent the driver thereof from doing what he did and had failed to take advantage of that opportunity (*R. v. Horn & Britz*, 1938 T.P.D. 174). In this case it was ruled that the fact that the first accused was travelling on a straight part

of the road at high speed need not have called for any comment in so far as the second accused was concerned. On the other hand if the driver's speed of the handling of the vehicle in question is such that the owner, sitting in the car, ought to have known of the likelihood of danger to others as a consequence, he may properly be convicted together with the driver (*Du Cros v. Lambourne* [1907] 1 K.B. 40). It follows that where a master sits next to his servant driving a motor-car on his (the master's) business and the master makes no effort to get the servant to stop **after** a collision has taken place, a court will be justified in holding that the master had authorized his servant not to stop and to convict him as a *socius criminis* for the statutory offence of failing to stop after an accident though he could not be held guilty of culpable homicide (*R. v. Shikuri*, 1939 A.D. 225). In this case an important distinction was drawn between a *continuous* and a *non-continuous* act. For the former, as, for instance, driving at an excessive speed, the master might well be liable. (See *ante*, p. 103.)

(d) PRESUMPTION FROM OWNERSHIP

There is fairly strong authority for the proposition that in civil cases the fact of ownership of a vehicle raises an inference that, at the time of an accident, it was being driven by a servant of the owner, within the scope of his authority: see *Barnard v. Sully* (1931) 47 T.L.R. 557, applying *Hibbs v. Ross*, L.R. 1 Q.B. 534 (a ship case). In *Goosen v. Stevenson*, 1932 T.P.D. 223, there was the additional evidence that defendant had signed a confession of guilt of wrongfully permitting the driver to drive the car without a licence. In *Gavin v. Seebrun*, 1935 N.P.D. 235, there was no evidence beyond ownership to establish the relation of master and servant; but there was additional evidence to show that, if the driver was a servant, he was acting within the scope of his employment; and Carlisle A.J. had some doubt as to whether mere ownership was enough to raise the inference. In this latter respect, American authority favours the inference being raised. *Gavin's* case was, however, distinguished in *Weir Investments, Ltd. v. Paramount Motor Transport*, 1962 (4) S.A. 589 (D) at 591-2.

The inference is, of course, rebuttable on proof of other facts, as in *Olympic Passenger Service (Pty.) Ltd. v. O'Connor*, 1954 (3) S.A. 906 (N) at 909. It is not a case of the onus being thrown on the defendant; it is merely a **circumstance** from which the court *may* draw the inference, if there are no other facts tending the other way, and if the defendant does not produce evidence to negative it. But it is probably enough by itself to raise a *prima facie* case. (See *Weir's* case (*supra*).) See also *Onus and Proof, post*, p. 120.

Accordingly, in an action for damages suffered as a result of a collision between two vehicles it is sufficient for the plaintiff to aver in his summons, or declaration, that the defendant was the *owner* of one of the cars and that that car was driven negligently by the defendant's servant for a *prima facie* case to be set up (*Olympic Passenger Service* case (*supra*)), but, when it comes to the question of adequacy of proof, while the fact of ownership 'eases the burden of proof' one has still to examine the evidence as a whole in order to determine whether the vehicle was driven on behalf of, or under the control of, the owner (*Archibald & Co. v. Sabala*, 1953 (1) S.A. 254 (N) at 256). Therefore, once it is shown that

the driver was engaged by the defendant to drive passengers on the day when the collision in question took place, then it is more probable, in the absence of factual, as opposed to speculative, indications pointing the other way, that the collision occurred while the driver was doing what he was engaged to do. In other words, although the onus is on the plaintiff, it is for the defendant (when confronted with facts from which it can reasonably be inferred that the driver, engaged by him, was acting in the course of his employment) to introduce facts which cast sufficient doubt on the inference which make it unsafe for the court to draw it (*S.A.R. & H. v. Dhlamini*, 1967 (2) S.A. 203 (D); *Bevan v. Carelse*, 1939 C.P.D. 323).

In criminal law, however, under the common law, there was no such presumption and the court was not justified in convicting without further evidence (*R. v. Rudolph*, 1934 T.P.D. 381; *R. v. Maramie*, 1934 T.P.D. 304), unless there was some specific legislation to the contrary (*R. v. Ellenberger*, 1939 O.P.D. 127). Having regard to the difficulty of the State, particularly in 'hit-and-run' cases, the provincial motor ordinances now contain provisions designed to cast the onus of proof upon the owner. The enactments read 'until the contrary is proved' (as in section 155(1)), and the owner of the motor vehicle will have to prove by a balance of probability that he was not involved in the particular offence charged (*R. v. Meyer*, 1950 (1) P.H., O. 10 (O)). Such presumption, arising from ownership, would not, of course, apply to the case of 'car hire' transactions where the vehicle only is hired on the understanding that it is to be driven by the hirer (see *post*, p. 110). It would, however, apply to vehicles bought under a hire-purchase agreement (see section 1 of Ord. 21 of 1966 (T)).

At common law the person behind the wheel is presumed to have been the driver of the car at the time of the accident, but this presumption, like all those of a rebuttable character, may be displaced by specific evidence to the contrary (*R. v. Johnson*, 1938 P.H., H. 285 (O)).

(e) SERVANT LENT OR HIRED

Where the servant of A is lent or hired to B for a particular piece of work, the question whether, in respect of liability for his negligence, he is to be regarded as the servant of A or of B is often a difficult one; and the question is still more difficult when, as is usually the case, he is employed in the management of a thing, such as a vehicle or machine, which is lent or hired with him. The English cases are numerous, and very difficult to reconcile; but the test to be applied is now, for England, authoritative. In *Bain v. Central Vermont Railway* [1921] 2 A.C. 412 the Privy Council, and in *Bull & Co. v. W. African Shipping Co.* [1927] A.C. 686 the House of Lords, approved of the statement of the law by Bowen L.J. that the court—

'has only to consider in whose employment the man was at the time the acts complained of were done, in this sense, that by the employer is meant the person who has the right at the moment to control the doing of the act'; so that 'when doing the work of and under the control of the man to whom he is sent, he is the servant of the latter'.

The question is the same when there is a choice between two possible 'masters' as it is when the employee may be either servant or independent

contractor—the question is, whose servant is he at the time, and the vital factor is **who had the power of controlling the manner in which he executed his work** (*Paxinos v. Van der Merwe*, 1930 O.P.D. 142). As observed by Van der Riet J. in *Kohlberg v. Uitenhage Municipality*, 1926 E.D.L. at 95, this statement covers crisply both the tests applied by Wessels J. in *Chatwin v. C.S.A.R.*, 1909 T.H. 33, and by Searle J.P. in *Penrith v. Stuttaford*, 1925 C.P.D. 154, and incorporates but extends that adopted by De Villiers C.J. in *Duigan v. Angehrn & Piel*, 1915 T.P.D. 82 (on whose **work** was he employed), in that it requires, in addition, that there should be the right of control. Accordingly in *McMillan v. Hubert Davies & Co.*, 1940 W.L.D. 256, it was specifically decided that, where the servant of one person is assigned to do work for another person, the test as to whether the latter is responsible for the negligent acts of the servant is not ‘for whose **benefit** the work is done’, but ‘who had the power of **controlling** the servant as to the manner in which he was doing his work at the time the injury complained of was inflicted’ (*King’s Transport v. Viljoen*, 1954 (1) S.A. 133 (C) at 136; *General Tyre & Rubber Co. (S.A.) Ltd. v. Kleynhans*, 1963 (1) S.A. 533 (N)). These matters are more fully dealt with by the author in *Master and Servant in S.A.*, pp. 264–5.

Car hired (or lent) with Driver

In regard to vehicles let out on hire with the driver, the general rule is that although the hirer has control over the driver as to where to go and what to carry, the hirer has no real or effectual control over the **manner of the driver’s driving**. In such cases the hirer would not be liable for the driver’s negligence and the latter’s employer would be responsible for his *culpa* (*Dowd v. Boase & Co., Ltd.* [1945] 1 All E.R. 605 (C.A.); *Mersey Docks & Harbour Board v. Coggins & Griffiths (Liverpool) Ltd. & McFarlane* [1946] 2 All E.R. 345 (H.L.)). In the latter case a crane was hired with the driver, and the House of Lords held that the fact that there was a contractual stipulation that ‘the driver so supplied shall be the servant of the applicants’ made no difference to the ultimate responsibility of his master. The same conclusion was arrived at in *Penrith v. Stuttaford*, 1925 C.P.D. 154, and is fully in accord with the decision in *Moroka v. McEwen*, 1910 O.P.D. 32.

Of course, where A lends or hires a thing to B, without at the same time providing a servant in connection with it, there is no ground for holding A liable for damage done by the use of the thing, merely on the ground of his ownership (*Knysna D.C. v. Cuthbert*, 1924 C.P.D. 172, ferry hired); though he may be liable, for example, for the results of a defect known to him.

(f) SERVANT’S SERVANT

It has been held that a master is not liable for the negligent act of a servant employed by his own servant without authority to do so unless such employment was in circumstances of urgent necessity (*McMillan v. Hubert Davies & Co.*, 1940 W.L.D. 256). The position would be otherwise, however, if the servant entrusted or left the keys of the vehicle in the hands of an incompetent or unlicensed driver (*Weir Investments case*, 1962 (4) S.A. 589 (N), summarized below).

Illustrative cases

Duigan v. Angehrn & Piel, 1915 T.P.D. 82: Plaintiff sued for injuries received in a collision with a van owned by defendants and driven by their general servant. The van was delivering ice for one G, who under a written contract bought the ice from defendants and hired the van and driver for delivery of the ice on his own account. Held, that the driver was not *pro hac vice* the servant of defendants, and they were not liable. The fact that the van bore the defendant's name, that G used defendant's invoices and letterheads and gave receipts in their name, was irrelevant, since no estoppel could be relied on in a case of this kind (per Bristowe J., because plaintiff had not altered his position to his detriment on the faith of the representation). Contrast *Imperial Cold Storage v. Yeo*, 1927 C.P.D. 432 (digested above at p. 102).

Penrith v. Stuttaford, 1925 C.P.D. 154: The defendant had lent his car for the day to an association which was entertaining visitors, to take them for a drive, the association directed the route and time. Defendant's chauffeur was sent to drive the car. Held, that he had not parted with control and was liable for the chauffeur's negligence. 'The association were not intended to have the slightest control as to how the chauffeur performed his work.'

Chatwin v. C.S.A.R., 1909 T.H. 33: A contracted to ballast defendant's line, under a contract which compelled him to hire from defendant engines and trucks with drivers and guards. The latter worked under regulations made exclusively by defendant but A had no power of dismissal. Held, a guard so employed remained the servant of defendant, which was liable for his negligence. Per Wessels J. at 50, after a review of the English cases, 'The principle to be extracted is, with whom did the complete control over the servant lie?'

Hendricks N.O. v. Van Biljon, 1940 S.R. 213: Plaintiff's minor son was being brought from a mine to Bulawayo, on instructions of defendant's wife. The vanette conveying him belonged to the defendant and was driven by one H, an employee of the defendant. Held, that the vanette was being used for the benefit of the defendant and that he was liable in damages for injuries sustained by plaintiff's son due to the overturning of the vanette.

Moroka v. McEwen, 1910 O.P.D. 32: A hired a wagon and driver to defendant for a fixed sum per day. Defendant had the ordering of what work should be done; but A paid the driver. Per Maasdorp C.J., 'unless A gave defendant special authority to interfere with the driver and give him instructions as to the mode of driving', defendant was not responsible for the driver's negligence. 'The driver was left perfectly free from interference by defendant; defendant had no authority to give him directions as to his driving.' Cf. *Quarman v. Burnett*, 9 L.J. Ex. 308, carriage and driver hired by the day.

Kohlberg v. Uitenhage Municipality, 1926 E.D.L. 90: C supplied carts and drivers to the defendant; C paid the drivers and had power of dismissal; but on the job they were under the control of the defendant's foreman. Held, that they were the servants of the defendant, which was liable for their negligence.

Eyssen v. Calder & Co., 20 S.C. 435: Defendant contracted to supply labour to the military authorities, but had no power of control. Held not liable for the acts of the labourers.

Weir Investments (Pty.) Ltd. and others v. Paramount Motor Transport, 1962 (4) S.A. 589 (D): The driver of a bus left its keys in the vehicle and the conductor then drove the bus away and negligently caused an accident. The driver knew that the conductor was unlicensed and incompetent. Held that the employer of the driver was liable for his negligence.

General Tyre & Rubber Co. (S.A.) Ltd. v. Kleynhans and another, 1963 (1) S.A. 533 (N): The first defendant, a farmer, employed the tractor driver as such. On the day in question he was driving the tractor on the farm of a neighbour for the mutual benefit of the latter and the first defendant. The first defendant had driven him across the main road as he was not licensed to drive and had later sent a message to the driver to leave the tractor there and to return to the homestead.

Instead of obeying his orders the driver drove the tractor on the main road where the accident occurred. Held that the driver was not only the servant of the first defendant but had been acting in the scope and course of his employment.

STATUTORY DUTIES

Where damage is done by the general servant of A, in the performance of a duty which is imposed by statute in such fashion that A has not control over the **manner** of its performance, A is not liable. The commonest application of the rule is to Government servants, and notably the police; but it is not limited to them, and applies whenever a statute prescribes the duty and the manner of its performance, and has been applied to the case of a location superintendent carrying out statutory duties in *Dumah v. Blom*, 1950 (1) S.A. 274 (T), and *Tshandu v. Ballendon*, 1945 A.D. at 464. In *B.S.A. Co. v. Crickmore*, 1921 A.D. 107, it was applied to a police constable employed by the company, by whom he was appointed and paid. In *Phillips v. Sapuka*, 1915 E.D.L. 289, the same principle (*semble*) was applied to a Government sheep inspector supervising private dipping as required by regulation. But 'the mere fact that the duty is statutory is not enough. There must be a lack of one or more of the essentials of the law relating to master and servant' (per De Villiers C.J. in *Union Govt. v. Thorne*, 1930 A.D. at 51), 'such as that the police officer was performing a duty of a personal nature which made him independent of the control of the Crown *pro hac vice*'. Where the power of control is present, so will be the liability; but where there is no power of control, there is no liability (see per Solomon J.A. in the *B.S.A.* case at 113). The rule therefore is not an exception, but a particular application of the general principle; so that, as remarked by De Villiers C.J. in *Thorne's* case, it does not matter whether the duty be statutory or imposed by the common law, provided there be no control (at 52). The police, and other persons paid by the State, are *prima facie* State servants; and it is for the State to show in a particular case that the nature of the duty took such a person out of the category of servant (*Thorne's* case at 51), i.e. is acting under a statutory duty and not in obedience to the orders of a superior officer (*Dames v. De Kock and another*, 1958 (1) S.A. 773 (W) at 775; *Mazeka v. Minister of Justice*, 1956 (1) S.A. 312 (A.D.)). See also *Woodiwiss v. Union Govt.*, 1937 N.P.D. 101; *Sibiya v. Swart*, 1950 (4) S.A. 515 (A.D.); *S.A.R. & H. v. Marais*, 1950 (4) S.A. 610 (A.D.), and the author in *Master and Servant in S.A.*, pp. 274-6; and see *ante*, p. 43.

Illustrative cases

B.S.A. Co. case, 1921 A.D. 107: A company was sued for wrongful arrest by a constable employed and paid by it. The power to arrest was derived from statute, which directed in what cases arrests should be made. Held, that as the company had no control in such matters and no power of interference, it was not liable. Cf. *Lawford v. Minister of Justice*, 1914 N.P.D. 284, where the same was held on exception in respect of arrest under Act 13 of 1912; and *Doig v. Durban Corporation*, 1929 N.P.D. 209; *Davis v. Union Govt.*, 1930 E.D.L. 386.

Union Govt. v. Thorne, 1930 A.D. 47: A Native constable was ordered by his superiors to take a trolley and bring in an injured person to the charge office. On the way he negligently injured plaintiff. Held, that the Government was liable.

De Villiers v. Minister of Justice, 1916 T.P.D. 463: A magistrate making a summary detention order under the Lunacy Proclamation of 1902 (Transvaal) is not a servant of the State.

Smith v. Union Govt., 1933 A.D. 363: A magistrate receiving compensation in terms of section 27 of Act 25 of 1914 is not a servant of the State; and no action lies against the State for payment of a sum so paid to a magistrate.

Lawrie v. Union Govt., 1930 T.P.D. 402: Where after arresting a person while driving a car the police detain the car for safe custody, they are not performing a statutory duty but an administrative duty, and the State is liable for their negligence. It may possibly be that in the actual taking of the car into custody the police are not acting as servants of the State; but in the subsequent detention they are.

Horn v. Union Govt., 1931 C.P.D. 165: It may be that a constable acting in terms of section 54 of Act 31 of 1917 (property seized to be carried forthwith before a magistrate) would not be a servant of the State. But if he fails to carry out the provisions of the Act, and instead carries the property from one town to another, he is a State servant and the State is liable. Action for payment of money taken by the police from plaintiff; held the State was properly sued; case sent back for further evidence.

S.A.R. & H. v. Marais, 1950 (4) S.A. 610 (A.D.): An engine-driver permitted a ticket-holder, a friend of his, to travel on an engine contrary to standing instructions. Held, that as such act was done on the driver's own act and that, in so doing, he was not furthering his master's interests and that the act was wholly outside the scope of his employment, the Administration was not liable for injuries caused to the said ticket-holder.

STATE LIABILITY

The State, in terms of Act No. 20 of 1957, is liable for the acts of its servants acting in their capacity and within the scope of their authority as such servants. This Act places the State on the same footing as a subject in respect of such liability (*Union Govt. v. Thorne (supra)* at 51). It should be noted, *passim*, that a soldier is not necessarily a servant of the State (*McArthur v. The King* (1943) Ex C.R. 77, and *Yukon v. Air Transport, Ltd.* (1942) Ex C.R. 181). The test in each case, however, is one of direction and control (*Union Govt. v. Hawkins*, 1944 A.D. 556). This matter is more fully dealt with *ante*, p. 43.

PROFESSIONAL DUTIES: MEDICAL MEN AND HOSPITALS

There is a special line of cases dealing with the liability of medical men, or of hospitals, for the negligence of nurses or other professional assistants. These cases are examined *post*, p. 133. They go to show that in respect of professional duties, where the assistant is expected to use her own discretion as to the performance of the duty, there is no liability either in the doctor whom she assists or in the hospital by whom she is paid. It is possible that these cases exemplify a general rule relating to all cases of employment of professional persons.

COURSE OF EMPLOYMENT

(a) *Basis*

Even though an employee be a 'servant' within the meaning of the above authorities, the master will be liable for his acts only if they were committed within the course of his employment (*Mkize v. Martens*, 1914 A.D. 382 at 390; *Jensen v. Williams Hunt & Clymer*, 1959 (4) S.A. 583 (O) at 589; *South British Insurance Co. v. Du Toit*, 1952 (4) S.A. 313 (S.R.) at 315). The reason for the limitation is obvious—where a servant acts outside the course of his employment he ceases *pro hac vice* to be a servant. The phrase 'within the scope of his authority' is also used in the English authorities; the two expressions are intended to be synonymous (per De Villiers J.A.; *Estate Van der Byl v. Swanepoel*, 1927 A.D. 141 at 151); our authorities prefer to speak of the course of employment,

following Pothier ('in the exercise of the functions to which he is appointed') and Voet (*in officio aut ministerio cui fuit praepositus*).

Where, therefore, S, the defendant's servant in charge of a lorry, lit a match while the lorry was being refilled with petrol, causing the plaintiff to be burned, the Court held that, taken in conjunction with the *nature of his employment*, this was a negligent act on the servant's part and that this was an act in the course of S's employment and the defendant was accordingly held liable in damages (*Hendrickz v. Cutting*, 1937 C.P.D. 417). In this case it was also ruled that the view taken by Gardiner J. in *Mbara v. Landrey*, 1917 C.P.D. 599, was altogether too narrow. In the latter case the employer's liability was limited to acts done (a) in furtherance of the object of employment, or (b) in what the servant believed to be the interests of the master, or (c) incidental to such employment. See also *Feldman (Pty.) Ltd. v. Mall*, 1945 A.D. at 743.

An act then is done within the course of the servant's employment when it is done 'in the exercise of the functions to which he is appointed' (per Innes C.J. in *Mkize v. Martens*, 1914 A.D. at 390), even though the unauthorized act constitutes some deviation from the unauthorized manner or method of performing his work (*Sauer N.O. v. Duursema*, 1951 (2) S.A. 222 (O)). 'No authority, express or implied, for the act complained of is necessary to render the principal liable, provided the agent was acting in the service to which he was appointed' (per De Villiers J.A. in the *Estate Van der Byl* case, at 151). But, 'an act done solely for the servant's own interests and purposes, and outside his authority, is not done *in* the course of his employment, even though it may have been done *during* his employment' (per Innes C.J., *supra*). Furthermore, it is no part of the servant's duty to pick up passengers on a road, and where the giving of **lifts to strangers** was something quite foreign to his duties and neither necessary nor incidental to them, the employer cannot be held liable to the servant's passenger for injuries received as a result of the servant's negligent driving (*Rossouw v. Central News Agency*, 1948 (2) S.A. 267 (W)). Nor is it the work of the Railways to transport passengers on the engine and, if the driver chooses to do so, he is acting outside the scope of his authority and employment (*S.A.R. & H. v. Marais*, 1950 (4) S.A. 610 (A.D.)).

For an example where the master was held liable in contract, but not in delict, for the action of his servant in bringing petrol on to his master's premises, see *South British Insurance Co. v. Du Toit*, 1952 (4) S.A. (S.R.) at 316.

Servant Causing Fires

Whether the *culpa* of the servant will be imputable to his master, when damage is caused thereby, depends largely on the circumstances of each particular case as to whether such act was done in the course and authority of his employment. Thus in *Mkize v. Martens*, 1914 A.D. 382, where it appeared that the act of a servant, in lighting a fire to cook his midday meal when engaged by his master who was a transport driver and who had to feed his servants when they outspanned on a trip away from home, was an act in the course of the affairs or business of the master and was done for his purpose and his benefit (*ibid.*, at 392). Consequently liability was imputed to him. Similarly, in *Barker v. Venter*, 1953 (3) S.A. 771 (E),

it was found that the servant's duty as a shepherd was to keep an eye on his master's farm. Here, after seeing to the cattle, examining the sheep, turning on a windmill, he sat down to bask in the sun and smoke. In so doing he set the grass alight, and the fire spread, causing the plaintiff damage. Held, that the servant was acting in the course of his employment. Again in *Bischoff Embroidery S.A. (Pty.) Ltd. v. S.A.R. & H.*, 1966 (4) S.A. 385 (W), it was ruled that the act of a servant in lighting a fire in one of defendant's railway shelters in order to prepare a meal was not an act of 'wilful misconduct' on his part, but it is clear that wilful misconduct cannot always be equated with *culpa*. Nor would a lessee evade liability for the act of his servant in throwing down a lighted cigarette on to the floor of a shop among paper rubbish (*Daly v. Chrisholm & Co., Ltd.*, 1916 C.P.D. 562, and *McLaughlin v. Koenig*, 1928 C.P.D. 102—both these cases were however based on contract). See also *Van Rooyen v. Humphrey*, 1953 (3) S.A. 392 (A.D.), where the defendant had given instructions to the induna in his employ to burn a paddock when the wind was favourable, but had left it to him to decide when the burning should take place. It was held that the burning of the grass by two other Bantu, on the specific instructions of the induna, attracted liability to the defendant.

On the other hand, where a son of the defendant, employed to herd goats, kindled a fire for his own purposes, to cook a hedgehog, it was ruled that the defendant could not be held liable (*April v. Pretorius*, 1906 T.S. 824). Again where a defendant was engaged to reap and husk certain mealies and employed a Bantu woman to assist him, it was decided that her act in lighting a pipe and negligently throwing down a lighted match, thereby causing a fire and damage, was not so 'incidental' to her employment as to attract liability to her master (*Mbara v. Landrey*, 1917 C.P.D. 599). Where, again, a fire was started by the defendant's servants (probably to cook meat), in direct conflict with the instructions of the employer, it was held that the lighting of a fire was not reasonably necessary for their work, that there was no reason to make the fire and that, therefore, their master was not liable (*Meyer v. Jackelson*, 1961 (3) S.A. 165 (T) at 167).

Conclusions

From the authorities cited above, and also *Hendrickz v. Cutting*, 1937 C.P.D. 17 (see *ante*, p. 114), it appears that if a fire is caused while the servant is on duty and is engaged upon his master's affairs or business (and this includes his being obliged to remain on, or at, a place in order to cook his meals) the master would be liable to others for damage caused by such fire. This conclusion is supported by the dictum of Lord Wright in *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* [1942] 1 All E.R. 491 (H.L.) at 497G, where he said:

'The act of a workman in lighting his pipe or cigarette is an act done for his own comfort and convenience and at least, generally speaking, not for his employer's benefit. . . . Nor is such act *prima facie* negligent. It is in itself both innocent and harmless. The negligence is to be found by considering the time and the circumstances in which the match is struck and thrown down. The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to his employer himself or to his property or to third persons or their property, and thus impose the same liability on the employer as if he had

been doing the work himself and committed the negligent act. This may seem too obvious as a matter of common sense to require either argument or authority.'

Other Illustrative cases

The act of a servant in washing his hands was held not to be 'incidental' or 'connected with' his employment, and, consequently, the master was not liable for the flooding of the premises by the servant's leaving the tap running (*H.K. Manufacturing Co. v. Sadowitz*, 1965 (3) S.A. 328 (C)).

A police constable, while in a van conveying another Bantu constable S, had pulled out a revolver and, acting on puerile mentality, pointed it at S. A shot went off and S was hit in the chest, sustaining permanent injuries. Held, that the accident had arisen in the constable's course of employment and out of such employment (*Minister of Justice v. Khoza*, 1966 (1) S.A. 410 (A.D.)). This decision should be compared with that of Wynne J. in *Dolf v. Heath and another*, 1959 (1) S.A. 714 (E), where a pay-clerk official had done the same thing to a labourer employed on the Railways and where it was held that such act was not in the course of employment but as a result of an act of caprice. This decision would, it is submitted, not now be applicable in view of the decision in *Khoza's case (supra)* which, however, has been criticized in *Annual Survey of S.A. Law*, 1966, pp. 160-2.

A workman was on his way to work in the firm's vehicle, which broke down, and he, having the keys of the premises, transferred himself to his own car in order to arrive at his work in time, but on his way had an accident. Held, that he was not acting in the course of his employment (*Ward v. Workman's C.C.*, 1962 (1) S.A. 728 (T)).

But if a workman sustains an accident at a place which is the property of his employer, and the workman is to go and do his work, or is in the process of leaving his work, then he is in the place within the course of his employment within the meaning of the definition of 'accident' in the Workmen's Compensation Act, No. 30 of 1941 (*Nel v. Minister van Publieke Werke*, 1962 (2) S.A. 157 (T)).

(b) DISOBEYING INSTRUCTIONS

The fact that the servant has been disobedient to instructions cannot exonerate the master from liability (*Union Govt. v. Hawkins*, 1944 A.D. at 564), for the law is not so futile as to allow the master, by giving instructions to his servant, to set aside his liability (*Limpus v. London General Omnibus Co.*, 32 L.J. Ex. 40; *Estate Van der Byl v. Swanepoel (supra)*; *S.A.R. & H. v. Marais*, 1950 (4) S.A. (A.D.) at 617, and *General Tyre & Rubber Co. (S.A.) Ltd. v. Kleynhans*, 1963 (1) S.A. 533 (N)). See also *Feldman (Pty.) Ltd. v. Mall*, 1945 A.D. at 736, where Watermeyer C.J. said:

'... but the expression "scope of employment" is apt to be misleading, unless one is alive to the fact that the words "scope of employment" are not equivalent to "scope of authority". One is apt, when using the expression "scope of employment" in relation to the work of a servant, to picture to oneself a particular task or undertaking or piece of work assigned to the servant, which is limited in scope by the express instructions of the master and to think that all acts done by the servant outside of, or contrary to, his master's instructions are outside the scope of his employment; but such a conception of the meaning of "scope of employment" is too narrow. Instructions vary in character, some may define the work to be done by the servants, others may prescribe the manner in which it is to be accomplished; some may indicate the end to be attained and others the means by which it is to be attained. Provided the servant is doing his master's work or pursuing his master's ends he is acting within the scope of his employment even if he disobeys his master's instructions as to the manner of doing the work or as to the means by which the end is to be attained. A servant may even omit to do his master's work, and if such omission constitutes a negligent or improper performance of his master's work and causes damage, the master will be legally responsible for such damage. Consequently, a servant can act in disobedience of his master's instructions and yet render his master liable for his acts.'

It is clear that the fact that the servant is doing something not merely not authorized, but **actually forbidden**, will not always excuse the master (see, e.g., *Estate Van der Byl* case). Nevertheless it is essential that the function itself should have been authorized. A servant appointed to exercise **one function** does not act within the scope of his employment if he without authority exercises **another function**, even though he is still performing his master's work (*Roos v. De Loor's, Ltd.*, 1931 T.P.D. 100, confectioner driving van). As was pointed out by Hathorn J. in *Middleton v. S.A. Automobile Association*, 1932 N.P.D. 451, certain expressions used by Wessels J.A. in the *Estate Van der Byl* case raise difficulties in this connection; but it seems clear that the servant must be acting both in his master's affairs *and* within the course of his employment. See also the author in *Master and Servant in S.A.*, pp. 267-8.

On the other hand, it is not necessary that the servant should have been acting in the **interests of his master**, provided he is doing an act which falls within the course of his employment (*Lloyd v. Grace, Smith & Co.* [1912] A.C. 716, solicitor's clerk authorized to pass conveyances, passing one to himself); though no doubt the fact that the servant intends to benefit himself only may be relevant to show that his act did not fall within his employment.

If the servant is not about his master's business at all, but is on his own business, the master will not be liable. But (a) even though he is about his master's business, the master may not be liable if he was not acting within his function; and (b) even though he is pursuing his own ends and advantage, the master may be liable if the act was done within his function.

Of the cases concerning the control of vehicles, one type is where the servant in control allows another person, servant or third party, to drive. In such cases the other person probably is not acting within any employment in so driving; but the master is liable, because of the negligence of the servant in control and whose function it was to exercise such control (*Priestly v. Dumeyer*, 15 S.C. 393). Typical cases are *Engelhart v. Farrant* [1897] 1 Q.B. 240, and *Ricketts v. Tilling* [1915] 1 K.B. 644 (these and other cases are discussed in a note in the *Law Times*, reprinted (1936) 53 S.A.L.J. 206. See also *Weir Investments (Pty.) Ltd.* case, 1962 (4) S.A. 589 (D)).

(c) FROLIC OF HIS OWN

Another type of case is where the servant is employed to drive his master's vehicle, and deviates from his proper route for a purpose of his own. In such cases there was at one time a disposition in England to hold that even a slight deviation would constitute a frolic of the servant's own; but De Villiers C.J., in *Priestly v. Dumeyer*, 15 S.C. 393, expressed his disapproval of such cases, and they have never been followed in South Africa. Per Watermeyer C.J. in *Feldman (Pty.) Ltd. v. Mall*, 1945 A.D. at 743:

'Another form in which the law is sometimes stated is that a master is liable for those wrongful acts of a servant which are done while he is on his master's business but not for those which are done while he is on a frolic of his own. This statement of principle is misleading. The question is not whether the servant was

on a frolic of his own at the time when the wrongful act was done, but whether the act, causing damage, was an act done by the servant in his capacity as servant and not as an independent individual. The phrase "frolic of his own" comes from the judgment of Baron Parke in *Joel v. Morrison*, 6 C. & P. at 503, but Baron Parke carefully qualifies the phrase. He said: "If he be going on a frolic of his own *without being at all on his master's business* the master will not be liable." This qualification is necessary because the servant, while on his frolic, may at the same time be doing his master's work and also because a servant's indulgence in a frolic may in itself constitute a neglect to perform his master's work properly, and may be the cause of the damage.

'A railway gatekeeper at a level-crossing who deserts his post on a hot day to get some refreshment is, while away from his post, indulging in a frolic of his own, but if an accident happens at the crossing which is due to his absence his master would be liable. There are several English cases which serve as illustrations of this principle. A solicitor's managing clerk who, for his own benefit, defrauds his master's client by means of false documents executed by him in his capacity as managing clerk, though his fraudulent act is a "frolic of his own", renders his master liable because his conduct is a fraudulent mismanagement of his master's business (*Lloyd v. Grace, Smith & Co.* [1912] A.C. 716). See also *Ricketts v. Thos. Tilling, Ltd.* [1915] 1 K.B. 644.'

It would appear, therefore, that if the servant is employed to drive the vehicle, no simple deviation will excuse the master, even though it amounts in practice to a use by the servant for his own purposes (see, e.g., *Limason v. Leyland Motors*, 1929 C.P.D. 348; *General Tyre & Rubber Co. v. Kleynhans and another*, 1963 (1) S.A. 533 (N) at 535), although a completely unauthorized expedition on the servant's own affairs would still be held to fall outside his employment. But where it is no part of the servant's function to drive the vehicle, and he is merely permitted to use it for his own purpose, there is no ground for holding the master liable (*Higbid v. Hammett, Ltd.* (1932) 49 T.L.R. 104, where the servant used a bicycle to go home for lunch). Similarly, where the servant was accustomed to drive to his work in the docks every day in a motor-car it was ruled that, as the master neither facilitated nor controlled the servant's method of getting to work, the master could not be held responsible for the negligence of the servant since such acts were not done in the course of the latter's employment (*Lorentz v. Dorman Long (Africa) Ltd.*, 1943 E.D.L. 169). Again, where a driver was told to wait on the premises until a certain time but, in the meantime, used the truck to proceed to his home in order to procure his pass, it was ruled that he was on a frolic of his own (*Tsehlane v. Dura Foundation Co. (S.A.) (Pty.) Ltd.*, 1962 (3) S.A. 693 (T)). Nor is the servant acting within the course of his employment when he proceeds on the firm's bicycle in order to go to a market to buy his own goods during working hours (*Carter & Co., Ltd. v. McDonald*, 1955 (1) S.A. 202 (A.D.)).

It is therefore always a question of degree whether the servant's departure from the direct route constitutes a roundabout or improper way of doing his duty or whether it is a separate and independent journey taken as a frolic of his own. In *Feldman (Pty.) Ltd. v. Mall (supra)* the Court was of the opinion that though the servant had disobeyed his master's instructions and deviated from the prescribed route and had gone on his business for less than fifteen minutes yet, inasmuch as the collision took place when the servant was on his return journey, he had resumed his work and was, therefore, on his master's business.

One of the reasons for liability in this regard is that the master is answerable for the wrongs of his servant, not because he is authorized by the master or personally represents him, but because he **is about the master's affairs**, and the latter is bound to see that his affairs are conducted with due regard for the safety of others. Pragmatically the employer is held liable because, where one of two innocent parties has to suffer a loss arising from the misconduct of a third party, it is for the public advantage that the loss should fall on the one who could most easily have prevented the happening or the recurrence of the mischief, since it is within the master's power to select trustworthy servants who will exercise due care towards the public and carry out his instructions (*Feldman (Pty.) Ltd. v. Mall (supra)* at 740). See also *Union Govt. v. Hawkins*, 1944 A.D. 556 at 562, and *African Guarantee & Indemnity Co. v. Minister of Justice*, 1959 (2) S.A. 437 (A.D.). In this case two constables, while on patrol duty, digressed therefrom to engage in a race with a fast car, and here it was ruled that, in so doing, they had not entirely abandoned the work of their employer, who was therefore liable for damages caused by their negligence (see also *Boberg* in (1962) 79 *S.A.L.J.* at 141-2).

Servant of Garage Workshop

Those cases must be **distinguished** from those in which there is a **contractual duty** between the plaintiff and the master. In such cases, where the plaintiff entrusts his property to the defendant, and the defendant delegates the duty of taking care of it to his servant, the fact that the servant makes some unauthorized use of the property is no defence; because it was his precise function to take care of it. So in *Central Motors v. Cessnock Co.*, 1925 S.C. 796, where plaintiffs entrusted their car to defendants for safe custody, and defendants' night-watchman took it out for an unauthorized drive and damaged it, defendants were held liable. This case was approved and applied in *Aitchison v. Page Motors, Ltd.* (1936) 52 T.L.R. 137, where plaintiffs sent a car to defendants for repair, defendants sent it to a subcontractor, and defendants' servant went to fetch it but used it for a private trip in which it was damaged. In the former case, at any rate, it seems probable that a third party would also have a right of action. Similarly, in *Olivier v. Weinberg*, 1943 A.D. 181, it was held that where the defendant had agreed to garage plaintiff's car at 'owner's risk', and it was proved that the defendant's Bantu employee had taken the car out unlawfully, and outside the scope of his employment, for a joy-ride, that the defendant should nevertheless be held liable for damages sustained to the car on such unauthorized trip. Similarly where the owner of a car had arranged with the dealer, from whom he had purchased it, for the car to be serviced and repaired by the dealer, who also agreed to provide a driver to take the owner to his destination and then to drive the car to the dealer's premises for servicing and repair, the dealer is liable for his driver's negligence if, when on the return journey, the driver has an accident (*Silhouette Chemical Works (Pty.) Ltd. v. Steyn's Garage (Brooklyn) (Pty.) Ltd.*, 1967 (3) S.A. 564 (T)). Again, where an employer supplies transport (e.g. loaned a bicycle) to his workman to enable the latter to come to and from his place of work, the workman is in the course of his employment in so proceeding (*Xakaxa v. Santam Insurance Co., Ltd.*, 1967 (4) S.A. 521 (E)).

(d) ONUS AND PROOF

The onus of establishing that the servant was acting in the course of his employment is on the party seeking to hold the master liable; and such onus is not shifted by the mere proof that the act was done at a time when, or a place where, the servant was in his master's employ (per Innes J.A. in *Mkize v. Martens*, 1914 A.D. 382 at 391, followed in *Dolph v. Heath*, 1959 (1) S.A. 714 at 720 (E), and distinguished in *Meyer v. Jackelson*, 1961 (3) S.A. 165 (T) at 167). Everything depends upon the nature of the act and its relation to the scope of the employment (*ibid.*). But the plaintiff is assisted by the rule that 'less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party' (per Innes J. in *Union Govt. v. Sykes*, 1913 A.D. 156 at 173). In the case of vehicles, there is American authority to the effect that mere proof of ownership in the defendant is sufficient to raise a *prima facie* case, not only that the vehicle was being driven by the defendant's servant, but also that the servant was acting within the course of his employment. See also *S.A. General Inv. & Trust Co., Ltd. v. Mavaneni*, 1963 (4) S.A. 89 (D) at 91. It is at least clear that very slight evidence will be required in these cases to raise the inference, which, of course, the defendant can rebut by showing that in fact the servant was not acting in the course of his employment. In *S.A.R. & H. v. Dhlamini*, 1967 (2) S.A. 203 (D), Miller J. held that, when it is shown when the driver was engaged to drive passengers on a given day in the defendant's car and that a collision occurred on that day while he was, in fact, doing so, it is 'more probable', in the absence of factual, as opposed to speculative, indications pointing the other way, that the collision occurred while the driver was doing what he was engaged to do. While it is not the law that mere ownership of a motor vehicle makes a person liable, yet the fact of such ownership is some evidence fit to go to a jury that, at the material time, the motor-car was driven by the owner of it or by his servant (*Bevan v. Carelse*, 1939 C.P.D. 323 at 325). This case was cited with approval in *King's Transport v. Viljoen*, 1954 (1) S.A. 133 (C) at 136 (see *ante*, p. 108).

In criminal cases only the actual driver at the time is liable for offences committed under the Ordinance but, in the first instance, the owner thereof is presumed to have been the driver (section 155) and secondly, the police have the power to ascertain from him the necessary information as to who was the driver at the time (section 158(1)(h)). Nevertheless, when the matter comes to trial, there is nothing either in section 266 of the Criminal Procedure Act, No. 56 of 1955, or the common law which can compel one spouse to give evidence against his or her consort. (See the author in *The Law of Evidence in S.A.* at p. 309, and *R. v. Van der Lith*, 1931 T.P.D. 114.)

(e) ADMISSIONS BY SERVANT

It was at one time held, following English law, that the admissions of a servant were not admissible as against his master or employer on the basis that, when a man engages a servant, he knows that he will be liable for the latter's *actions* but that he cannot be bound by the babbling, irresponsible and, in some cases, malicious statements which any employee may wish to make concerning his master's affairs (*Wishart v. Mason*,

1931 N.P.D. 530; *Samual v. S.A.R. & H.*, 1927 (1) P.H., F. 78, and *Kelly v. S.A.R. & H.*, 1928 T.P.D. 671). In other words, the plaintiff had to establish that the servant had some authority from his master to make inculpatory statements against him (*Katz v. S.A.R. & H.*, 1937 (1) P.H., K. 2 (O); *In re S. S. Winton, Avenue Shipping Co. v. S.A.R. & H.*, 1938 C.P.D. 247 at 249–30). Such authority could be found in the master referring the inquirer to his servant for an explanation as to the cause of damage (*Van Rooyen v. Humphrey*, 1953 (3) S.A. 392 (A.D.) at 397).

These decisions have now been overruled by the Appellate Division in *Botes v. Van Deventer*, 1966 (3) S.A. 182 (A.D.) at 202–6, wherein it was ruled that, since there was a ‘privity of interest’ between a master and his servant, where the latter is acting in the scope of his authority and in the course of his employment, in regard to the *acts* of the servant, the servant’s verbal, or other, admissions were admissible against his master, since the basis is one of substantive law and is not a rule of evidence. It is, of course, open to the master to show that he is **not bound** by such admissions (*ibid.* at 206E). In view of this ruling it is clear that the decisions in *Sunnyhoek Private Residential Hotel v. Shields*, 1953 (1) S.A. 494 (T), and *Simmonds N.O. v. Gilbert Hamer & Co., Ltd.*, 1963 (1) S.A. 897 (N) at 911–13 and 918, are now inapplicable. The same rule applies in criminal trials (*R. v. Pillai*, 1953 (2) S.A. 373 (N)). There is, however, a caveat to be observed in this regard, namely that the fact that an admission has been made by a servant does not automatically render it admissible unless the party relying thereon can establish a legal liability upon the servant for his own actions in relation to the damage complained of. Moreover, the servant’s act must be clearly delictual and not based on contract, for a servant is, in general, not liable to third parties in respect of contracts for his master (save under the conditions mentioned by the writer in *Master and Servant*, pp. 290–2). Furthermore, a servant is liable to recompense his master for the damages which the latter has had to pay to a third party as a result of the servant’s own negligence (*Romford Ice & Cold Storage Co., Ltd. v. Lister* [1955] 3 All E.R. 460 (C.A.)).

Illustrative cases

Feldman (Pty.) Ltd. v. Mall, 1945 A.D. 733: A servant of the defendant had been given the custody of a motor-van and a number of parcels with instructions to drive the van and to deliver the parcels to various customers in a town. Having delivered the parcels he was to return the van to a certain garage. After delivering the parcels, however, he drove the van to a place some miles away on his own business and there drank enough liquor to make him incapable of driving the van with safety. Shortly after his departure from such place and on his way back to the garage, he negligently collided with and killed the father of two minor children. Held that, although in the taking of the van on a separate and independent journey the servant had departed from his master’s work, yet, inasmuch as the collision had taken place when he set out on his return journey, he had resumed such work and that therefore his master was liable for his negligent driving. The driver of a military vehicle, acting on the instructions of a sergeant in charge of him, drove the latter home instead of returning to the depot. Held, that the driver was not on a ‘frolic of his own’ (*Swart v. Union Govt.*, 1948 (3) S.A. 149 (T)).

Mkize v. Martens, 1914 A.D. 382: A transport driver employed two small boys, whom he supplied with food. While he was away, the boys, being in charge of the expedition, lit a fire to cook food, and negligently allowed it to spread. They had no express authority to make a fire, and had never done so before. Held, the act was

within the course of their employment. But, as Innes C.J. and Solomon J.A. indicated, this was a border-line case which might have been decided the other way if the master had not supplied food, which would require cooking. Contrast *April v. Pretorius*, 1906 T.S. 824, where a mere herdboy lit a fire to cook a hedgehog and where it was held to be outside his employment. But see *Meyer v. Jackelson*, 1961 (3) S.A. 165 (T). Here the defendant's servants lit a fire (probably to cook meat), such act being against the express instructions of their master, and it was held that the master was not liable for their negligence in allowing the fire to spread.

Olivier v. Weinberg, 1943 A.D. 181. Defendant accepted plaintiff's car in his garage at 'owner's risk'. Defendant's Bantu employee, unlawfully and outside the scope of his employment, took the car out for a joy-ride and damaged it. Held, that the defendant was liable in damages. This case was upheld on appeal (1943 A.D. 181).

Lotter v. Rhodes, 19 S.C. 122: It is (or was in 1902) in the course of the employment of a farm labourer to fire his master's veld to improve the grazing.

Reid v. Bouverie, 1914 N.P.D. 203: A Bantu was employed to cut scrub and stack it, being paid for that job only. He set fire to the scrub. Held, that this fell outside his employment; and that though he was a servant, his master was not liable for the spread of the fire.

Mbara v. Landrey, 1917 C.P.D. 599: A employed B to reap mealies, B employed a Bantu woman who smoked on the job and caused a fire which burnt A's crops. Held, that, as this was not within the course of employment, B was not liable to A; though (per Gardiner J.) in the case of a permanent caretaker, smoking might be so incidental to his presence as to entail liability. Note this is a case of liability not to a third party, but to a party to a contract. Gardiner J. distinguishes *Daly v. Chisholm*, 1916 C.P.D. 562, where the manager for a lessee smoked and caused a fire, on the ground that there the lessee was under a contractual duty to care for the premises and the onus lay on him to establish due diligence. *Sed quaere*.

Estate Van der Byl v. Swanepoel, 1927 A.D. 141: A taxi-driver in breach of express instructions conveyed a passenger to a forbidden destination, and on the way back to his stand negligently injured plaintiff. Held, that the employer was liable.

Union Govt. v. Hawkins, 1944 A.D. 556: A Bantu troop-carrier went off the prescribed route on orders from a European staff sergeant. Held, that such deviation was not such an abandonment of his master's business in favour of some activity of his own as to release the master from liability for damages.

Lorentz v. Dorman Long (Africa) Ltd., 1943 E.D.L. 169: Defendant's servant, to the defendant's knowledge, used a motor-car in which to proceed to and from his work at the docks. On his way one day he negligently killed plaintiff's husband. Defendant had no right to interfere with his servant's means of transport or his choice of route. The harbour was not under defendant's control but the latter had obtained a special permit for the servant's entry into the harbour area. Held, that as the servant's employment commenced only when he reported for work, the defendant was not liable.

Limason v. Leyland Motors, 1929 C.P.D. 348. A motor-salesman had a car at his disposal for his work, which was of an irregular nature as regards time, keeping him busy sometimes after office-hours and during the luncheon interval; he regularly used the car to go home to lunch, and it was in furtherance of his employer's business that he should so use it. On an occasion when he had so used it, and on his way back to his employer's premises he had deviated on a private errand, and he injured plaintiff. Held, that he was acting within the course of his employment. Contrast *Higbid v. Hammett, Ltd.* (1932) 49 T.L.R. 104, where the employee merely borrowed the firm's bicycle in order to go home to lunch.

Wright v. Stuttaford & Co., 1929 E.D.L. 377: H, a credit manager of defendant's branch, visited a town in his territory for the purpose, *inter alia*, of pushing the sale of cars. While driving a car to exhibit it to a prospective purchaser, with plaintiff as a passenger, he negligently collided with a train and plaintiff was injured. There was evidence that it was no part of his duty to drive or demonstrate cars, or even to sell them. Held, that in driving the car he was acting within the course of his employment. On the facts as found by the Court, this case, though it goes far, seems sound; but it should be applied only with the utmost caution to different sets of fact. It is in conflict with the decision in *Sauer N.O. v. Duursema*, 1951 (2) S.A. 22 (A.D.).

Victor v. Logie, 1923 E.D.L. 233: A servant employed to drive passengers to a town, wait for them, and then bring them back, became intoxicated while waiting, and when driving about, 'to see if the fresh air would revive him', injured plaintiff. Held, that the master was liable.

Roos v. De Loor's, Ltd., 1931 T.P.D. 100: A servant, employed to make confectionery, drove his master's van to deliver confectionery to customers. Held, that the master had given express authority; but (per Tindall J.) had there been no such express authority the act of driving would not have fallen within the course of employment: the doctrine 'cannot be extended to the case where a servant appointed to do work of a certain class requiring special skill, takes it upon himself to do work of an entirely different class also requiring special qualifications'.

Middleton v. S.A. Automobile Association, 1932 N.P.D. 451: A patrolman, employed by the defendant association to assist members, was provided with a vehicle which had no passenger accommodation, and was expressly forbidden to carry passengers. In making a trip to assist plaintiff (not a member), he carried plaintiff on the vehicle; plaintiff was injured. Held, that even if the servant in assisting plaintiff was acting in the course of his employment (which doubted), he was not so acting in carrying plaintiff as a passenger. 'If it is asked upon whose affairs he was engaged, the answer is that they were his own. He did the act as a private individual either from the motive of kindness or with the prospect of a gratuity.'

Moosa v. Duma & Vereeniging Municipality, 1944 T.P.D. 30: Where a servant has a quarrel with a member of the public, and such quarrel arises out of the servant's performance of his work and is followed then and there by a tortious act, the proper interpretation of the servant's behaviour is that he is improperly carrying out what he was employed to do, and not that he was acting out of personal malice or caprice. This case, although the cause was based on assault and defamation, is instructive in determining what may be considered as being in the course of employment.

Caledonia Co. v. East London Harbour Board, 23 S.C. 540: A harbour-master had power to order ships to shift their berths for harbour purposes. He gave such orders for the purpose of a regatta. Held, that such orders fell within his employment.

Hallett v. Jenkins, 22 N.L.R. 32: Defendant's general servant in driving out a trespassing cow negligently injured her. Defendant held liable. Contrast *Conradie v. Wiehahn*, 1911 C.P.D. 704, where defendant's son used to do casual work in his father's lands after school hours, and negligently injured a trespassing animal, not in an attempt to drive it out, but in a boyish prank, the Court doubting whether the son was a 'servant', and holding that in any event he was not acting in the course of any employment.

LIABILITY FOR AN INDEPENDENT CONTRACTOR

The term 'independent contractor', as was pointed out *ante* (p. 101), is used, in antithesis to that of 'servant', to include any employee who is not a servant. An **independent contractor is one who undertakes to produce a certain result for another**, but is not subject to the control or directions of that other as to the manner in which he achieves it (*Riverton Meat Co. v. Lancashire Shipping Co. (Pty.) Ltd.* [1960] 1 All E.R. 193 (C.A.)).

(a) BASIS OF LIABILITY

For the negligence of such independent contractor the employer is not liable. But this does not mean that by employing an independent contractor the employer will free himself from liability, because in respect of certain operations there is a duty on the employer himself to exercise care, a duty which he cannot delegate to another and so free himself unless the provisions of the contract, or other factors, make him liable (*Peri-Urban Areas Health Board v. Munarin*, 1965 (1) S.A. 545 (W) and 1965 (3) S.A. 367 (A.D.)). In respect of such operations, therefore, even though an independent contractor has been employed, the employer will be liable

if proper precautions have not been taken; and he will be liable, not by way of vicarious liability, but direct *in propria persona*. That this is the true foundation of the liability is established by the judgment of Stratford J. in *Dukes v. Marthinusen*, 1937 A.D. 12. His Lordship points out that although there has often been a want of precision in the authorities, the true basis of liability, both in England and in South Africa, is the existence of a duty in the employer, the failure to perform which has resulted in the injury (see the judgment at p. 20). Liability is, therefore, dependent on the existence of a duty on the employer to take reasonable care, a duty which he cannot delegate to anyone else (*Munarin's case (supra)* and *Crawhall v. Minister of Transport and another*, 1963 (3) S.A. 614 (T)). (See the author in *Master and Servant in S.A.*, pp. 260–6, and *McKerron on Delict*, p. 97–9).

The burden of proof of establishing that the person causing injury is an independent contractor is upon the person alleging it (*Auto Protection Society Ltd. v. Macdonald (Pty.) Ltd.*, 1961 (3) S.A. 908 (C) at 911, (reversed on the facts, 1962 (1) S.A. 793 (A.D.) at 799)).

(b) WHEN THE DUTY ARISES

This duty of the employer arises in accordance with the ordinary principles of negligence, namely, whenever the reasonable man would realize that unless precautions are taken, the operations which he orders, will cause danger to others. A phrase frequently used in the cases is, work which is 'dangerous per se' or necessarily dangerous (*Phillips v. S.A. Independent Order of Mechanics*, 1916 C.P.D. 61). In *Andrew v. Patchell*, 1926 T.P.D. 207, Stratford J. speaks of 'the certainty of danger and the likelihood of injury'. In *Dukes v. Marthinusen (supra)* at 23, he says that it is unwise to so compress the test; and that it is better to say with Lord De Villiers (in *Newman's case*, 12 S.C. 61) that the duty arises when 'it may reasonably be anticipated that, without due precautions, the safety of the public will be endangered'. The **test** then is whether the **operation is a dangerous one**, in the sense that public safety is imperilled by it unless precautions are taken to obviate that peril (*ibid.*, at 24). Most of the authorities refer to danger *to the public*; but in principle it would appear that if danger to an individual would be anticipated, the same doctrine would apply; and in *Phillips's case*, 1916 C.P.D. 61, it was applied to the removal of support from the land of a neighbour. Accordingly, such duty may fall upon the employer of the independent contractor, not only vis-à-vis the general public but also in respect of the contractor's employees injured by the contractor's negligence (*Crawhall's case (supra)*).

Apart from dangerous operations, there are certain other cases in which a duty arises which cannot be delegated. The common case is a **statutory duty**; where by statute a duty is imposed on a person, he cannot escape liability for its non-performance by handing over the operation to an independent contractor. Other cases mentioned in the English authorities are, (1) cases where the employer if he did the work himself would do so at his peril; (2) cases where the work involves an interference with the right of another, and (3) cases where there is a continuous duty in the employer, e.g. the duty of municipalities in respect of obstructions in the streets (per Wessels J. in *Minister of Posts & Telegraphs v. Johannesburg*

Consol. Inv. Co. (3), 1918 T.P.D. at 257-8). Thus in *Crawhall's* case (*supra*), it was held that (a) if the work has to be done on premises to which the public has access, and (b) that such work can reasonably be expected to cause damage unless proper precautions are taken, then there is a duty upon the occupier (employer) to see that such precautions are taken and that the premises are safe, notwithstanding the employment of an independent contractor.

(c) HOW IS THE DUTY DISCHARGED?

If the liability arises from a breach of duty by the employer, it should be possible for him to escape liability by showing that he was free from negligence (*Dukes v. Marthinusen* (*supra*) at 23). Thus where an owner of a building employs a competent contractor to repair a leaking roof he cannot be held liable for the negligence of the contractor for not doing his work properly even though the tenant suffers damage (*Hunter v. Cumnor Investments*, 1952 (1) S.A. 735 (C)). Again where a fitter negligently failed to secure the nuts on two of the inspection covers of a ship, in consequence of which the ship became unseaworthy and sea-water entered the hold of the ship causing damage to the cargo, the shipowners will not be liable for such act of the independent contractor (*Riverstone Meat Co., Ltd. v. Lancashire Shipping Co., Ltd.* [1960] 1 All E.R. 193 (C.A.)). This decision should be compared with *Balfour v. Barty King* [1957] 1 All E.R. 156 (C.A.) where workmen, employed by an independent contractor engaged to thaw frozen pipes on defendant's premises, used a blow-lamp in close proximity to inflammable material thereby causing a fire which spread to plaintiff's house, and it was ruled that the defendants were liable for the negligence of the workmen for allowing them to work when there was a great deal of combustible material in the vicinity of the pipes.

(d) DISTINGUISHED FROM LIABILITY FOR SERVANT

The distinction between the two grounds of vicarious liability where a contractor is employed, and that where a servant is employed, may be summarized thus: Whenever a servant is employed, the master will be liable for the negligence of that servant, within the course of his employment. But where a contractor is employed, the employer is liable only if the work was, to use the shortest phrase, per se *dangerous*. And even where the work is per se dangerous, he will not be liable for the **collateral negligence** of the contractor, as he would be if he were a servant, but only for harm directly resulting from the dangerous nature of the work he has ordered. For example, if a dangerous excavation be ordered, the employer will be liable if it is left unprotected and a passer-by falls in; but he will not be liable if the contractor negligently drops a pick-axe on someone in the course of the work, as he would be if the work were being done by his servant. (See *R. v. Murray & Stewart*, 1950 (1) S.A. 194 (C).)

(e) SUBCONTRACTORS

The common law duty of a master to ensure the safety of his servant does not apply in the case of a subcontractor where defective scaffolding is provided and erected by the contractor for the subcontractor. In such

circumstances the subcontractor relies on the expert knowledge of the contractor and he is not liable to his servant for injury resulting from the negligence of the contractor (*Hodgson v. British Arc Welding Co.* [1946] 1 All E.R. 95).

Illustrative cases

Crawhall v. Minister of Transport and another, 1963 (3) S.A. 614 (T): Plaintiff fell over a barrier consisting of planks on bricks about a foot high around a strip of the floor of the concourse of an airport occupied by first defendant but being relaid by an independent contractor. She sued both the defendant and the contractor. Held, that both defendants were liable.

Munarin v. Peri-Urban Areas Health Board, 1965 (1) S.A. 545, confirmed on appeal but the widow's damages increased (1965 (3) S.A. 367 (A.D.)): The Health Board had contracted with a contractor that the work had to be done to the satisfaction of the board's engineer and that he had to comply with the latter's instructions and directions on any matter. The contractor had agreed to supervise the work properly and not to damage adjoining property. The board's engineer had designed the project and was in charge of the works and had the power to insist on the dismissal of any incompetent workmen. Held, that since the board had specific knowledge of a very dangerous situation which had been allowed to develop (i.e. a deep trench which was a threat to the support of an adjoining wall) and had taken no steps to stop the work before the trench collapsed on top of plaintiff, the defendants were liable in damages. See also *Rhodes Fruit Farms, Ltd. and others v. Cape Town C.C.*, 1968 (3) S.A. 514 (C).

Singh v. Provincial Insurance Co., Ltd., 1963 (3) S.A. 712 (N): A handyman who, gratuitously and as a favour, attends to the mending of the mechanism of another's car, and thereafter tests it out for him, is not acting as the servant of the latter in so doing.

Dukes v. Marthinusen, 1937 A.D. 12: During the demolition of a building adjoining a public road, an independent contractor was negligent in not taking precautions against collapse of wall; his employer was held liable (cf. *Silansky's case*, 1916 C.P.D. 683).

Andrew v. Patchell, 1926 T.P.D. 207: To erect a fence across a road freely used by the public, is dangerous per se.

Newman v. East London Municipality, 12 S.C. 61: The same principle was applied to an excavation in (or near) a public road (cf. *Frank v. Van Rooy*, 1927 O.P.D. 231; *Oehley v. Erasmus*, 1909 E.D.C. 127; *Atkins v. Camps Bay Tramway Co.*, 18 S.C. 245).

Aberdeen Municipality v. Wilke, 1910 E.D.C. 320: Under a contract to eradicate prickly pear, the contractors manufactured poison and left it exposed on the commonage. Held, that the municipality was liable.

Minister of Posts v. Johannesburg Consol. Inv. Co., 1918 T.P.D. 253: Defendant company, owner of a vacant stand, sold trees on it on condition that purchaser should fell and remove them. The trees, in being negligently removed, fell and damaged telephone wires. Held, that owner not liable, the operation not being per se dangerous. *Secus*, of course, if the trees overhung a public road. (Dicta in this case criticized in *Dukes v. Marthinusen*.)

Bowman v. Durban Breweries, 25 N.L.R. 330: The doctrine does not apply to the erection of a chimney, not near a public road.

Burks v. Springs Municipality, 1917 W.L.D. 143: Application for an interdict against the removal of a coal-dump in such fashion as to cause a nuisance. Interdict granted pending action. Per Ward J., 'I am unable to say that the council does not fall within the exceptions' involving liability for an independent contractor.

Addis v. Schiller & Co., 1906 T.H. 210: Held, that in fact the employee was a servant; but suggested that even if he were a contractor the employer would be liable, since the work (erection in a house of a domestic gas-generator) was 'work of a technical and dangerous nature which was peculiarly their business'.

Phillips v. S.A.I.O. of Mechanics, 1916 C.P.D. 61: Principle applied to removal of support from adjoining land.

(The English cases are brought up in an article in (1934) 50 *Law Quarterly Review* 71, cited and approved in *Dukes v. Marthinusen*.)

DELICTS OF AGENT?

A principal is liable for the acts of his agent where the agent is a servant but not where the agent is a contractor, subcontractor, or the servant of a contractor or sub-contractor (*Colonial Mutual Life Ass. Soc. v. MacDonald*, 1931 A.D. 412). The effect of the judgment establishes a sharp distinction in respect of the employer's liability between the **servant** and the **agent who is not a servant**. But there are expressions in the judgment which indicate that the principal may be liable, in delict, for the acts of an agent who is not a servant. Roos J.A. (at 427) says that the 'ordinary agent' 'only renders the principal liable for the delicts and quasi-delicts committed by the agent in obtaining the result which the principal authorized him to obtain'; and again, 'liability is, of course, imposed on the principal for the misrepresentations and frauds by which the agent has obtained the advantage for his principal which he was authorized to obtain by his mandate'. And Wessels J.A. (at 442) says that 'where the wrong is attached to the very business the agent is transacting for his principal, there the liability of the principal is clear', adding, 'it is upon this principle that a principal is always liable for the fraud or misrepresentation of his agent, because the wrong here is in the very transaction for which the agent is employed'. What do these rather puzzling dicta mean? It is submitted that they have reference, not to liability to a third party, but to liability towards a **co-contracting party**, or at least towards a party with whom the agent was endeavouring to effect contractual relations on behalf of his principal. In any event, if the liability envisaged is towards third parties, it appears to be liability for *dolus*, and not for negligence. It is submitted that, contract apart (where an agent may be guilty of misrepresentation or fraud, *ibid.*, at 442), there is no liability in the principal for the **negligence of his agent**, unless that agent was a 'servant'; or unless the negligence occurs in the doing of an act which was **expressly authorized** or is obtaining the particular result which the principal authorized him to obtain. (See also *Van Blommenstein v. Reynolds*, 1934 C.P.D. 265 at 268; *De Villiers and Macintosh on Agency* at pp. 268-90, and *Singh v. Provincial Insurance Co., Ltd.*, 1963 (3) S.A. 712 (N) at 717.)

(a) VEHICLE DRIVERS

No presumption of agency can arise where a friend is merely taking the defendant's car to the garage for service and where she neither asked nor instructed him to do so (*Kinnear v. Ruto Flour Mills (Pty.) Ltd.*, 1968 (2) P.H., O. 51 (T)).

Where, therefore, an agent has no power to delegate his mandate to another, the principal cannot be rendered liable for the negligent conduct of that other person (*Ah Chow v. Rust*, 1945 E.D.L. 230). In this case the appellant, a woman married out of community, was the owner of a motor-car she could not drive and for which she had no licence. She had telephoned her husband to come and call for her, but he requested one H to drive the car for the purpose. H drove negligently and injured plaintiff. Held, that he had no authority, express or implied, to drive appellant's car.

In *Priestly v. Dumeyer* (1898) 15 S.C. 393, on the other hand, an accident took place while a cab was being negligently driven by a passenger to whom the cabman, the **servant** of the defendant, had temporarily

entrusted the driving while he, the cabman, occupied a seat inside the cab. In this case the defendant was held liable on account of the cabman's negligence. Here the vicarious liability was not based on agency but on the relationship of master and servant (see also *ante*, pp. 103-4).

(b) ATTORNEYS

In English law the client is liable for all the mistakes which his attorney might make while acting within the scope of his authority. What is within the scope of his authority depends greatly upon the custom of the profession (*Smith v. Keal* (1882) 9 Q.B.D. 340). Thus, it has been ruled that it is within the authority of a solicitor to endorse a writ, and any mistake therein which misleads the sheriff in seizing the wrong goods is one for which the client is liable (*Jarmain v. Hooper* (1843) 26 M. & G. 827). See also *Morris v. Salberg*, 22 Q.B.D. 614, where the principal was held liable for a wrongful seizure caused by his solicitor misdescribing the defendant, i.e. by saying that he lived in a particular place where he did not in fact live but where his father lived.

It is extremely doubtful whether this rule can be said to be a part of our South African law, especially in view of the decision in *Colonial Mutual Life Assurance Soc. v. MacDonald*, 1931 A.D. 412 (see also *Fortman v. S.A.R.*, 1947 (3) S.A. 505; *Rose and another v. Alpha Secretaries, Ltd.*, 1947 (4) S.A. 511 (A.D.); and *Bruce N.O. v. Berman*, 1963 (3) S.A. 21 (T)), since most disputes of this character would arise from the contract of mandate to perform the particular task in question, regard being had to whether the attorney accepted that mandate and whether he was negligent either in the performance of it or failed to perform it at all (*Blooms Woollens (Pty.) Ltd. v. Taylor*, 1961 (3) S.A. 248 (N)), although, as Milne J. pointed out at 254, failure to take care of another's **property** can found an action both in contract and in delict. (See also *Knoble v. Murray*, 2 S.C. 75; *Meade v. Clarke*, 1922 E.D.L. 49.) It is submitted that since a person can be liable for the delicts of his agent only if (a) he specifically authorized the delict or (b) the act was committed in obtaining the authorized result or (c) he subsequently ratifies the wrongful act, the negligence of an attorney in making false representations as to the value or quality of property, which he is selling on behalf of his client, can attract liability to his client (see *Colonial Mutual L.A. Soc. v. MacDonald* (*supra*) at 442, and *De Villiers and Macintosh on Agency*).

SERVANT SUING MASTER

There is a duty imposed upon the master, at common law, to take due precautions to ensure the **safety of the servant**, both in respect of premises and of apparatus (*S.A.R. v. Cruywagen*, 1938 C.P.D. 219). For there is a duty on the master to provide safe working conditions and safety appliances where the work is dangerous (*General Cleaning Contractors v. Christmas* [1952] 2 All E.R. 1110 (H.L.); see the Mines and Works Act, No. 27 of 1956, section 5). But the plaintiff workman must prove that the master knew or ought to have known that the conditions were dangerous or unsafe (*Graham v. Co-operative Wholesale Society, Ltd.* [1957] 1 All E.R. 654; see also Norman-Scoble, *Master and Servant*, pp. 178-82). (In respect of the premises, the servant is in the position of an 'invitee' as that

term is used in the English law (*post*), p. 196)). In respect of the apparatus and machinery provided, the master must provide machinery reasonably suitable for the work, and safe for the workmen if used with proper care (*Nicholson v. East Rand Mines*, 1910 W.L.D. 235; *Lahrs v. S.A.R. & H.*, 1923 E.D.L. 329; *Barker v. Union Govt.*, 1930 T.P.D. 120). There is, as one would have surmised, no duty on the employer to protect his employee against assaults by burglars (*Mason v. Vacuum Oil Co.*, 1936 C.P.D. 219). There are nowadays, however, elaborate statutory provisions both in respect of premises and of machinery, which in most cases supersede, or at least define, the common-law duty. Actions against the master at common law are in any event rare nowadays, in view of the provisions of the Workmen's Compensation Act, No. 30 of 1941, as amended, section 7 of which provides that no action shall lie at law by a workman against his employer in respect of an injury due to an accident. This section therefore precludes an action for 'general damages', i.e. for damages which fall outside the scope of the Act and in respect of which no compensation can be recovered against the Workmen's Compensation Commissioner (*Pettersen v. Irvin & Johnson, Ltd.*, 1963 (3) S.A. 255 (C) at 256). The workman may, therefore, still sue for damages for shock, pain and suffering in terms of section 11(1) of the Motor Vehicle Insurance Act, No. 29 of 1942 (*Bhoer v. Union Government and another*, 1956 (3) S.A. 582 (C); *South British Insurance Co., Ltd. v. Harley*, 1957 (3) S.A. 368 (A.D.); *Dominion Insurance Co. of S.A. v. Pillay*, 1954 (3) S.A. 967 (N)), although such damages could not be claimed under Act No. 30 of 1941. The master is not, moreover, liable for the safety of the **property** of the servant while the latter is engaged in the employment of the master (*Deyong v. Shenburn* [1946] 1 All E.R. 227). In this case the plaintiff, an actor, had his clothes stolen from his dressing-room during a rehearsal for a pantomime and it was ruled that there was no obligation at common law in England to provide a proper system for the safeguarding of the servant's property. (See also *post*, p. 210.)

Where a servant protested against a certain horse (which was restive and had run away on several occasions), but had eventually carried out the order of his master, the Court decided that the master had been negligent in failing to provide him with a horse which was safe and suitable for the work and that there had been no contributory negligence on the part of the servant. Furthermore that, as it was no part of the servant's occupation to manage unruly horses, he had not accepted the risk thereof (*Bowater v. Rowley Regis Borough* [1944] 1 All E.R. 465).

COMMON EMPLOYMENT

In England, the peculiar doctrine of common employment once existed, namely, that a servant cannot in general recover against his master in respect of damage suffered through the negligence of a fellow servant. This doctrine is, however, not a part of our law (*Eyssen v. Calder & Co.*, 20 S.C. 435; *Waring & Gillow v. Sherborne*, 1904 T.S. 340, and *Lewis v. Salisbury G.M. Co.* (1894) 1 O.R. 1).

LIABILITY OF OTHERS TO MASTER

Third persons may incur liability in delict to the master for injuries caused to the servant in so far as the master has suffered damages thereby.

Thus, where a music-hall artiste was injured owing to the negligence of the defendant, the owner of a hall, in allowing a loose floor-board to exist on the stage, it was ruled that the master was entitled to damages (*Mankin and another v. Scala Treadmore Co.* [1946] 2 All E.R. 614). See also *Attorney-General, New South Wales v. Perpetual Trustee Co.* [1955] 1 All E.R. 846 (P.C.).

In South Africa it has been held, however, that while the Roman-Dutch rule might have applied to *domestic* servants the rule does not apply to other types of servants such as Government employees (*Union Govt. v. Ocean Accident & Guarantee Corp.*, 1956 (1) S.A. 577 (A.D.)), unless it can be established that the wrongdoer knew that the person injured was a servant and must have contemplated the damages suffered by the plaintiff employer (*ibid.*).

CHAPTER VI

MEDICAL PRACTITIONERS AND HOSPITALS

SUMMARY

MEDICAL PRACTITIONERS

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MEDICAL PRACTITIONERS

1. LIABILITY FOR OWN ACTS

The liability of a medical practitioner for his own negligent acts depends upon a straightforward application of ordinary general principle. Since he exercises a profession which demands both skill and capacity, he is bound to exhibit such skill and capacity; not the highest possible degree of skill, but a **reasonable degree** (*Mitchell v. Dixon*, 1914 A.D. 519; *Coppen v. Impey*, 1916 C.P.D. 309). This rule applies also to an unqualified person performing a medical function (*R. v. Mahlalela*, 1966 (1) S.A. 226 (A.D.)). In deciding what is reasonable the court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs (*Van Wyk v. Lewis*, 1924 A.D. 419 at 444; *Dale v. Hamilton*, 1924 W.L.D. at 200; *Roe v. Minister of Health* [1954] 2 All E.R. 131 (C.A.) and *S. v. Mkwetshana*, 1965 (2) S.A. 493 (N)). (For the details of the latter case see *post*, p. 135.) Accordingly, if the act complained of is in accord with ordinary or normal medical practice, it cannot be regarded as a culpable one (*Mahon v. Osborne* [1939] 2 K.B. 14, [1939] 1 All E.R. 535 (C.A.)).

(a) Diagnosis

In respect of an error of diagnosis, he will not be liable unless the error was so palpable as to be *per se* proof of negligence; implying an absence

either of reasonable care or of reasonable knowledge and skill (*Mitchell v. Dixon (supra)*). Per Innes C.J., at 526:

'A medical practitioner is not necessarily liable for a wrong diagnosis. No human being is infallible; and in the present state of science, even the most eminent specialist may be at fault in detecting the true nature of a diseased condition. A practitioner can only be liable in this respect if his diagnosis is so palpably wrong as to prove negligence, that is to say, if his mistake is of such nature as to imply an absence of reasonable skill and care on his part, regard being had to the ordinary level in the profession.'

See also *Whiteford & Hunter* [1950] C.L.C. 684, W.N. 553 (H.L.).

In respect of matters of technique, the evidence of professional men will naturally be of the greatest assistance. But it is for the court to say whether any given practice is reasonable, and even a commonly accepted practice will not necessarily fulfil this requirement (*Van Wyk v. Lewis, supra*). In deciding whether a treatment was reasonable, the court will consider all the circumstances, such as urgency and isolation (*Webb v. Isaac*, 1915 E.D.L. 273). This would include consideration of two different or opposing medical opinions as to what is the proper practice, or *modus operandi*, in the act in question (*Bolam v. Friern Hospital G.M. Committee* [1957] 2 All E.R. 118 (Q.B.)). In practice, however, there are often considerable difficulties in obtaining the requisite evidence from which to draw conclusions of neglect or incompetence. See Strauss in (1967) 84 *S.A.L.J.* at 419-28.

A medical practitioner may be liable for failing to inform his patient of his bodily condition, if the result is that the condition is not properly treated; especially if that condition is due to the acts of the practitioner himself (*Prowse v. Kaplan*, 1933 E.D.L. 257). Accordingly, it has been held that the failure of a doctor or surgeon to warn a patient as to the meaning of certain symptoms, the significance of which may not be apparent to the layman, might properly expose a practitioner to a charge of negligence (*Dube v. Administrator, Transvaal*, 1963 (4) S.A. 260 (T)). In this case it was ruled that, while a physician cannot always be in constant attendance upon his patient who may have to be left to the care of his own devices (as in the case of a patient attending a clinic), yet, if the former knows of some specific danger, and the possibility of its occurring, it may well be part of his duty to his patient to advise him of the proper action to take in such emergency.

But whether a practitioner should warn a patient of the dangers of fracture, when administering shock treatment by electro-convulsive therapy and without administering one of the relaxant drugs, is a matter in which there are two bodies of opinion among medical practitioners and a doctor is not negligent in acting in accordance with the practice accepted by a responsible body of medical opinion (*Bolam v. Friern Hospital G.M. Committee (supra)*).

A practitioner who advises a patient to consult some other person, whether qualified or not, is no doubt under a duty to exercise reasonable care in the selection of such person. If that person is, to his knowledge, forbidden by law to carry out the recommended treatment, he will be liable for the results of the latter's negligence (see *Lymbery v. Jefferies*, 1925 A.D. 236 at 244). But, by such recommendation, he does not make

the recommended person his servant, so as to be liable for his acts without fault on his own part (*ibid.*).

(b) Standards of care

Is a greater degree of skill required of the specialist than of the general practitioner? Wessels J.A., in *Van Wyk v. Lewis* (*supra*) at 457, holds the view that one cannot expect the same amount of skill and care from a country practitioner as one would expect from a specialist at a large city hospital. In *Webb v. Isaac*, 1915 E.D.L. 273, Graham J.P., in applying the rule in *Mitchell v. Dixon*, said that, if any other rule was applied, no country doctor could take the risk of visiting a patient. See also *Beven on Negligence*, 4th ed., p. 1355. (Cf. *R. v. Van der Merwe*, 1953 (2) P.H., H. 124 (W)). The principle is well illustrated in *Phillips v. William Whiteley* [1938] 1 All E.R. 566, where the Court ruled that a jeweller who pierces the ears of his customers, in order to affix ear-rings purchased by them, cannot be expected to display the same standard of skill and care as would be shown by a competent surgeon. The decision in *Phillips's* case is not in accord with our principles of *imperita culpa adnumeratur* and is in direct conflict with the ruling in *S. v. Mahlalela*, 1966 (1) S.A. 226 (A.D.) (see also *ante*, p. 23), which, in *Coppen v. Impey*, 1916 C.P.D. 309, has been held to be applicable to medical practitioners. Certainly it is culpable for a doctor to handle a case which is beyond his powers, or to prescribe a drug with the propensities of which he is not fully acquainted (*R. v. Crick* (1895) 1 F. & F. 519; *R. v. Burdee* (1916) 25 Cox C.C. 598; *S. v. Mkwetshana*, 1965 (2) S.A. 493 (N), and *Van der Merwe's* case (*supra*)).

It is submitted, however, that a practitioner, who sets himself up as a specialist in a particular branch of medicine, should be expected to display a higher standard of proficiency, and therefore care, than one who has not. In other words he must expect to be judged by a specialized standard. This view finds support in the decision in *R. v. S*, 1948 P.H., H. 166 (C), where it was held that a person, required to do the work of an expert, must conform to the acts of a reasonable man, viewed in the light of an expert.

(c) Use of special apparatus in treatment

Practitioners who employ radiological or other electrical therapy should be **thoroughly familiar** with its technique and dangers. Lack of the special knowledge required in the use of this treatment would be cogent evidence of the practitioner's negligence should the patient be burned in the process (cf. Rhodes, Gordon & Turner, *Medical Jurisprudence*, p. 25, and *Gould v. Essex County Council* [1942] 2 K.B. 293).

A therapist who proposes to give X-ray therapy of such a dosage that permanent injury may result and fails to explain the situation and resultant possible dangers to the patient, proceeds at his own peril since the patient's apparent consent to the treatment is no real consent (*Esterhuizen v. Administrator, Transvaal*, 1957 (3) S.A. 710 (T) (summarized *post* at p. 135).

(d) Continued treatment

There is no obligation upon a medical practitioner to undertake a case, but once he has done so, he must carry it through unless (a) he can leave

it in the hands of a competent practitioner, or (b) he issues sufficient instructions for future treatment, or (c) the patient is cured or does not need further attention (*Webb v. Isaac*, 1915 E.D.L. 273; *Farquhar v. Murray* (1901) 3 F. 859, and *Dube v. Administrator, Transvaal (supra)*). to which may be added an obvious exception, namely (d) or if the patient refuses further treatment or discharges himself from hospital. The practitioner may be liable if the death of the patient is due to his indolence (*R. v. Bateman* (1925) 28 Cox 33).

(e) Experiments and innovations

It is in the public benefit that new methods be tried out, but the practitioner should explain the nature of the experiment, what extra risk there is, and obtain the patient's consent thereto (Kitchen, p. 11, and Beven, II, p. 1359). Such consent will, however, be no defence if the experiment has no foundation in scientific thought and research. Where a doctor is dealing with a **dangerous drug** or medicine, he is required to exercise a greater degree of care and caution than in other circumstances (*R. v. Van Schoor*, 1948 (4) S.A. 349 (C); *S. v. Mkwetshana*, 1965 (2) S.A. 493 (N), and *Van der Merwe's case (supra)*).

A practitioner should not be faulted for failing to warn a patient of the danger of a proposed treatment unless it can be proved that the patient would not have consented to the treatment had he been duly warned (*Bolam v. Friern Hospital Committee* [1957] 2 All E.R. 118).

(f) Idiosyncrasies

The fact that a patient is peculiarly susceptible to harm from a certain drug or form of treatment (e.g. X-ray treatment) cannot raise any culpability on the part of the practitioner (*Coppen v. Impey*, 1916 C.P.D. 309, and *Dale v. Hamilton*, 1924 W.L.D. 184). The position would, it is submitted, be otherwise where the practitioner knew, or should have known, from his study or history of the case, that the patient had this idiosyncrasy or susceptibility.

(g) Consent to operation

The mere fact that a patient is in hospital does not entitle the attending medical practitioner to carry out a surgical operation upon him without his consent, or where he is not competent to give it, without the consent of some person in authority over his person. The practitioner would be justified in performing a major operation without consent only where the operation is urgently necessary and cannot, without due regard to the patient's interests, be delayed (*Ex parte Dixie*, 1950 (4) S.A. 748 (W) at 751, followed in *Esterhuizen v. Administrator, Transvaal*, 1957 (3) S.A. 710 (T) at 719; see also *Stoffberg v. Elliot*, 1923 C.P.D. 148 at 149).

The consent to an operation must be a real one and with full appreciation of the risks involved. Where, therefore, a therapist proposes to give X-ray therapy which might cause permanent injury, he acts at his own peril in giving such treatment if he fails to explain the situation and the resultant dangers to the patient, since the apparent consent is in the circumstances not a real one (*Esterhuizen's case, supra*). But a doctor need not go into the details of **all** the possible effects in this regard before

administering X-ray treatment (*Lymbery v. Jefferies*, 1925 A.D. 236). For further submissions see Millner in (1957) 74 *S.A.L.J.* 384.

Co-operation by Patient

In certain cases the co-operation of the patient is vital. Thus in *Clark v. Adams* (1950) 94 *S.J.* 599 where a physiotherapist, before turning on the machine, had requested the patient to give a warning if he felt more than comfortable warmth. The patient's leg was burned and it had to be amputated, and it was held that the warning given was inadequate inasmuch as he should also have been informed of the possible danger of his failure to co-operate.

Illustrative cases

S. v. Mkwetshana, 1965 (2) S.A. 493 (N): Where a medical practitioner, who was still serving his internship, had administered intravenously an excessive dose of a drug of which he either had insufficient knowledge and experience or was unaware of its risks, it was held that his conduct had been negligent and that he had rightly been convicted of culpable homicide.

Roe v. Minister of Health and others [1954] 2 All E.R. 131 (C.A.): Before an operation a patient was given a spinal anaesthetic consisting of nupercaine (by means of a lumbar puncture). This was contained in a glass which contained invisible cracks and had, as a result been contaminated with phenol. As a consequence the patient developed spastic paraplegia which resulted in a permanent paralysis from his waist downwards. Held, that in the circumstances and having regard to the standard of knowledge to be imputed to competent anaesthetists, the defendant could not be found to have been guilty of negligence.

Regina v. Van der Merwe, 1953 (2) P.H., H. 124 (W): The patient was treated with dicumarol and died of poisoning which was caused by the quantity she had taken. Held, that the medical practitioner should not have administered a drug of which he was unfamiliar without satisfying himself as to its properties and acquainting himself with the proper methods of using it.

Esterhuizen v. Administrator, Transvaal, 1957 (3) S.A. 710 (T): Mere consent to undergo X-ray treatment, in the belief that it is harmless, or being unaware of its risks, cannot amount to an effective consent to undergo those risks. Since a therapist is not called upon to act in an emergency involving a matter of life or death, if he employs a particular technique which he knows may cause disfigurement, cosmetic changes and severe irritation which will cause a death of the tissues and a risk of amputation, he must explain the situation and the resultant dangers to his patient and, should he not do so, he would be acting at his own peril.

S. v. Mahlalela, 1966 (1) S.A. 226 (A.D.): The appellant, a herb-doctor, had given a child a mixture containing vegetable poison but had perhaps not known that the medicine contained poison. Here Van Blerk A.R. (at 229), without referring to the *imperitum culpa adnumeratur* rule, based his conclusion on 'wat 'n gewone redelike mens sou besef het dat die kruie moontlik lewensgevaarlik kan wees'.

Mitchell v. Dixon, 1914 A.D. 519: Defendant, having diagnosed pneumothorax, inserted a syringe fitted with a steel needle into plaintiff's back. The needle broke. Held, allowing an appeal from a jury's findings, that (a) there was no evidence on which it could be held that there was a wrong diagnosis, (b) it was not negligence to use a steel instead of a platinum needle, (c) no other acts of negligence had been established, (d) the fact of the needle breaking did not, on the evidence, establish negligence.

Van Wyk v. Lewis, 1924 A.D. 438: In the course of an urgent and difficult operation performed at night, a swab was left in the patient's body, where it remained for twelve months. The defendant was assisted by a qualified nurse on the hospital staff, and in accordance with usual practice, the counting of the swabs was left to her. Held, (a) that the practice of leaving the checking of swabs to the nurse was a reasonable one; (b) that she was not a servant of the defendant, and he was not responsible for her negligence,

if any. The maxim *res ipsa loquitur* does not apply to the leaving of a swab in a patient's body. See *Mahon v. Osborne* [1939] 1 All E.R. 535 (C.A.); and see also *Morris v. Winsbury-White* [1937] 4 All E.R. 494 (K.B.) (tube left in a patient's body—no *res ipsa loquitur*—no liability since it was the duty of the resident surgeon to remove it).

Webb v. Isaac, 1915 E.D.L. 273: Defendant set plaintiff's fractured leg, on a remote farm, under very difficult conditions. Thereafter he did not visit the patient, not wishing to run up fees, and being furnished with frequent favourable reports. Held, (a) the original treatment was reasonable under the circumstances; (b) though defendant should have visited again, it was not proved that the unfavourable result might not have occurred had he done so. Judgment of absolution granted.

Prowse v. Kaplan, 1933 E.D.L. 257: Defendant, a dentist, in extracting plaintiff's teeth, dislocated her jaw. Held, that he had not been negligent. Thereafter, however, he either failed to diagnose the dislocation, or failed to inform her of it; and in a subsequent endeavour to reduce it, broke her jaw and did not inform her of the fracture. Held, that in these respects he had been negligent.

Lymbery v. Jefferies, 1925 A.D. 236: Defendant advised plaintiff to go for X-ray treatment to one E. E was not a radiologist (a qualified medical man), but a radio-grapher, who was in charge of the X-ray department at the local hospital. Defendant indicated the treatment to E, but took no part in its administration. Held, that defendant was not negligent in selecting E, who was well qualified to give the treatment, and who, in giving it, did not 'practise as a doctor' in breach of the Medical, Dental and Pharmacy Act. Held further there was no duty on defendant in the circumstances to inform plaintiff of the risk of burns, such burns being rare and the treatment as a rule being devoid of danger.

Dale v. Hamilton, 1924 W.L.D. 184: Defendant employed X-ray apparatus to diagnose plaintiff's condition. By reason of the tube being too close, plaintiff was burnt. The apparatus had recently been set up by an expert. Held, that defendant, who was bound to show reasonable skill in the management of the apparatus, was not entitled to rely on the expert's adjustment; and was liable in damages. *Obiter*, the occurrence of burns in diagnostic work by X-ray is probably a case for the operation of the maxim *res ipsa loquitur*.

R. v. Akerele [1943] 1 All E.R. 367: The accused had administered a mixture of sobita to a number of children. The mixture was far too strong and was followed by fatal results. Held that he was not guilty of negligence according to English law.

R. v. Chamberlain (1867) 10 Cox 486: The accused had administered a drug the nature of which he was ignorant. Held, he had been negligent.

Clerk & Lindsell on Torts, 9th ed., p. 271: Faulty conditions or position of instruments used, or if they are infected or dirty may create liability for death if negligence is present.

2. LIABILITY FOR ACTS OF ASSISTANTS

Whether a doctor is liable for the acts of those who assist him in his work will depend upon whether they are his 'servants', and the test as to whether they are his 'servants' will usually be whether they are under his order and control as to the **manner** in which they do their work (*Mahon v. Osborne* [1939] 1 All E.R. 535; *Jones v. Manchester Corporation* [1952] 2 All E.R. 126).

The application of this principle to the facts of medical cases is not simple. A doctor may employ his own assistant; or he may be assisted by the staff of some institution such as a hospital or nursing-home. His own assistant will normally, it is submitted, be his servant; but subject to the question, discussed in the next section, as to whether professional assistants are ever to be regarded as servants. But where a doctor is assisted by the staff of an institution, such staff will become his servants only if he exercises 'control' over them within the meaning of the authorities on master and servant (*Jones's case (supra)*; *ante*, p. 113).

In *Van Wyk v. Lewis*, 1914 A.D. 419, Innes C.J. describes the qualified sister who assisted at the operations as having 'independent duties to discharge', of which checking the swabs was one; and says that the question of the surgeon's liability for her acts is disposed of by 'the opinion already expressed as to the independent part played by her'. 'She was not the servant of the respondent; she was under his general control during the operation, but she was also a collaborator' (at 450). Kotzé J.A. (at 454) says that 'circumstances may arise where the surgeon may become liable for the acts of the nurses or sister in attendance'; but that 'her duty in counting and checking the swabs is quite independent of him'. Wessels J.A. (at 458) says that 'the relation of sister or nurse in a public hospital to a surgeon operating in that hospital is not that of master and servant nor is it analogous to such a relationship'; in spite of the fact that, as pointed out in *Hillyer v. Governors of St. Bart's Hospital* [1909] 2 K.B. 820, the nurse assisting at an operation is under the control of the surgeon and not of the hospital authority. In certain circumstances the surgeon's failure to check the nurse's count of the swabs used might constitute negligence (*James v. Dunlop*, 1931 *British Medical Journal* 730). In *Van Wyk's* case only three swabs were used. In *Mahon v. Osborne* [1939] 1 All E.R. 535 (C.A.) it was decided that the surgeon was not liable for the fact that a swab was left in the body of a patient after an operation. Similarly no *culpa* was imputed to him for leaving an overlooked tube in the patient's bladder for several weeks (*Morris v. Winsbury-White* [1937] 4 All E.R. 494 (K.B.)). These seem to be hard cases and it may well be that, in view of the later decisions regarding the liability of hospital authorities (see *post*, p. 138), a patient so treated will be afforded a satisfactory remedy against the hospital institution concerned. In *Urry and Urry v. Bierer and others*, 1955 *The Times*, 16th March, it was found that a pack had been left in the patient's abdomen after an operation and here Pearson J. held that both the surgeon and the nurse were equally responsible. In *Mahon v. Osborne* [1939] 1 All E.R. 535 (C.A.) a different conclusion was, on the facts of that case, arrived at in regard to the surgeon's liability.

It would appear to be clear from the above that whenever the assistant is performing an **independent task** which is properly entrusted to her and left to her discretion, she is not the servant of the surgeon. But it is not clear that the same is true of all acts done by her in the course of the operation. That would appear to be the view of Wessels J.A.; but Innes C.J. and Kotzé J.A. were much more guarded. If the assistant is, in respect of some act, e.g. tying of an artery, under the direct control of the surgeon, it is difficult to see on general principle why she should not be his servant *pro hac vice*.

HOSPITAL AUTHORITIES

1. DUTY OF

There can be no doubt that the governing body of a hospital, whether public or private, charitable or run for gain, is under a duty to exercise care both in the **selection of competent staff** and in the provision of **suitable premises and apparatus** (*Hillyer v. Governors of St. Bart's Hospital* (*supra*); *Byrne v. East London Hospital Board*, 1926 E.D.L. 128). What is suitable

apparatus will depend on the circumstances and the nature of the hospital. Apparatus which might be required of a large public hospital could not reasonably be expected of a private nursing-home, or, perhaps, a native mission hospital. Failure to fulfil this duty will constitute negligence *in propria persona*, rendering the authority liable in damages.

2. HOSPITAL'S LIABILITY FOR ACTS OF DOCTORS AND NURSES

History and Development

The earlier decisions in the twentieth century were all prone to the view that the vicarious responsibility of hospital authorities was dependent upon whether the medical practitioners and nurses, employed in such institutions, were, or were not, acting in their **professional capacities** when engaged upon activities the performance of which was alleged to have been negligent by an injured or complaining party. The conclusions arrived at (although in many respects the decisions were founded on the contractual relationship) between the respective opposing parties were as follows:

- (a) the hospital authority was not liable for the acts of its doctors and nurses, appointed and paid by it, while performing their **professional** duties, but
- (b) in so far as they were engaged upon **ministerial**, or administrative duties, the hospital authority would attract liability for their *culpa*;
- (c) in respect of visiting or consultative physicians or surgeons no liability would accrue

(*Hall v. Lees* [1904] 2 K.B. 602; *Strangeways-Lesmere v. Clayton* [1936] 2 K.B. 11; *Hillyer v. Governor of St. Bart's Hospital* [1909] 2 K.B. 820; *Evans v. Liverpool Corporation* [1906] 1 K.B. 160; *Marshall v. Lindsey C.C.* [1935] 1 K.B. 516). The basis for such decisions were founded upon the consideration that the contract of the hospital is not to nurse during the operation but to supply nurses and others in whose selection they have taken due care and that 'in matters of professional skill, in which the governors of the hospital neither do nor could properly interfere either by rule or by supervision', there could be no liability (*Hillyer's* case and *Marshall v. Lindsay C.C.* (*supra*)).

At the time many hospital authorities were, in the words of Wessels J. in *Hartl v. Pretoria Hospital Committee*, 1915 T.P.D. 336, 'quasi public charitable institutions', and the aforementioned English law principles of liability were, accordingly, adopted in our own law (see also *Lower Umfolosi Hospital v. Lowe*, 1937 N.P.D. 31).

This position was criticized by the author of the fourth edition of this work (p. 107) and subsequent decisions have now proved the justification thereof. See *Roe v. Minister of Health* [1954] 2 All E.R. 131 (C.A.) wherein a more realistic view was taken, presumably due to the fact that, under the welfare state position in the United Kingdom of free medical services, the large bulk of hospital institutions are under governmental or quasi-governmental control. (See *Cassidy v. Minister of Health* [1951] 1 All E.R. 574 (C.A.) and *Collins v. Herefordshire C.C.* [1947] K.B. 588, [1947] 1 All E.R. 633 (K.B.).) Thus it has been held that a radiographer's negligence would render the hospital liable for the consequences of his

actions (*Gould v. Essex C.C.* [1942] 2 All E.R. 237 (C.A.)) and that a hospital board would be liable for leaving the administration of a dangerous anaesthetic to an inexperienced doctor without adequate supervision (*Jones v. Manchester Corporation* [1952] 2 All E.R. 125 (C.A.)) or other negligent treatment. See also *Bullard v. Croydon Hospital G.M. Committee* [1953] 1 All E.R. 596 (Q.B.), and *Gold v. Essex C.C.* [1942] 2 K.B. 293.

In *Cassidy's* case (*supra*) negligence was found to have been properly imputed to the hospital authorities for keeping a patient's hand in splints for fourteen days although, during that time, he complained of pain and, as a result of his treatment, it was found that all four fingers were stiff and the hand became practically useless.

For the negligence of an **honorary** or **visiting** medical practitioner there would be no liability. However in *Collins v. Herefordshire C.C.* [1947] 1 All E.R. 633 (K.B.) the operating surgeon had ordered procaine on the telephone but the resident house-surgeon had misheard 'procaine' as 'cocaine' and had ordered the pharmacist to dispense the latter. The house-surgeon (who was then unqualified) had then given the injection without checking what it was he had ordered. Here it was ruled that the hospital authorities were guilty of negligence in operating a dangerous or negligent system and that they were liable for the damages caused to the widow of the patient for the death of the patient.

In our own courts the rule is now that when a hospital accepts a patient it owes him a duty to attend and to treat him with due and proper care and skill and that the hospital's practitioners must exercise that degree of care and skill which a reasonable practitioner would ordinarily have exercised (*Dube v. Administrator, Transvaal*, 1963 (4) S.A. 260 (W)). In this case the hospital was held liable in damages for the negligence of its servants in applying a plaster of paris too tightly, in failing to diagnose the possible onset of a Volkmans contracture and in failing to give plaintiff instructions to return immediately if the pain persisted or a swelling developed.

In this regard the dictum of Lord Alness in *Lavalle v. Glasgow Infirmary*, 1932 S.C. 247, is appropriate:

'Why should they [the governors] be obliged to supply competent nurses but are not obliged to supply nurses for whose care they are responsible? I cannot find any justification for the supposed distinction. . . . If a patient goes into such an institution for treatment, it seems to me difficult to maintain, with any show of reason, that he has not a good claim against the managers of the home if he is injured by the negligence of one of the nurses in the discharge of her professional duties.'

3. CHEMISTS

Negligence on the part of a chemist in making up a doctor's prescription can render him liable for resultant damages and even the penal consequences of the criminal law (*R. v. Hosiosky*, 1961 (1) S.A. 84 (W)). In this case the doctor had prescribed 500 milligrams of aralin for a child of 4 years of age, but the chemist had made up the prescription at ten times the strength required, with the result that the child died. Consequently the accused was convicted of culpable homicide.

CHAPTER VII

DIVISIONAL COUNCILS, MUNICIPALITIES, PUBLIC OFFICIALS

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The general question of liability for breach of a statutory duty has already been discussed (*ante*, p. 6). It is proposed here to examine the position of divisional councils and municipalities in respect of the construction and repair of roads and streets; with a note on the position of public officials.

A divisional council or municipality or other local authority, being a *universitas*, may be sued in delict and is liable for the negligence of its servants acting in the scope of their authority and in the course of their employment or where they have been expressly authorized so to act by the body in question (*Middelburg Municipality v. Schoombie*, 1920 T.P.D. 227; *Kohlberg v. Uitenhage Municipality*, 1926 E.D.L. 90).

DIVISIONAL COUNCILS

(a) ROADS

Repairs. Divisional councils by statute (Ord. 12 of 1952, as amended by Ord. 4 of 1953) are charged with the *positive duty* of constructing, maintaining or repairing all proclaimed roads within their division; in addition, they are granted the *power* of constructing or repairing any *public road* in their division.

In respect of **public roads**, the powers are permissive only; no positive duty is imposed. In respect of such roads, the divisional council is in the same position as the municipality (for which see the next section and *Cathcart D.C. v. Hart*, 9 S.C. 80, where the council was held liable in respect of a slit caused by a new danger introduced into a public road, but not liable in respect of a hole arising from mere non-repair).

But in respect of **proclaimed** roads, an active duty is imposed. Failure to carry out this duty of repair will entail liability for consequent damage. A road suitable for horse-drawn but not for automobile traffic may (or might in 1914) be sufficient for some localities (*ibid.*); and a bridge need not necessarily have a railing able to withstand the impact of a cart and horses (*Potgieter v. Albert D.C.*, 1923 E.D.L. 485). Proof by the divisional council that the funds at its disposal did not permit of the maintenance of a better road may therefore be a defence; but not in respect of a danger such as a hole or a projecting rock, at any rate where the council should have known of it in time to have removed it. The onus of establishing such defence lies on the council (*Victoria East D.C. v. Pieterse*, 1926 E.D.L. 38).

Where, therefore, defendant had constructed a road through a cutting with the knowledge that an overhead railway bridge would be constructed over that cutting, and it was proved that the defendant had had previous knowledge of the new danger caused to cattle stampeding over a cliff at the point of access, it was held that, since a new danger had been introduced and since a recurrence of such event could have been prevented by the erection of an inexpensive fence, it had been guilty of negligence (*Administrator, Cape v. Preston*, 1961 (3) S.A. 562 (A.D.); see also (1961) 78 S.A.L.J. 381).

If, however, a new danger is introduced, such as the making of strip roads, such work must have *appreciably* increased the likelihood of that danger occurring (*Murray v. Bulawayo Municipality*, 1952 (4) S.A. 575 (S.R.)).

The Ordinance requires written notice of the accident, with particulars of cause of action and nature of damage, to be given within seven days; but a superior court may give relief. The power will be given a liberal interpretation (*Gibbons v. Cape D.C.*, 1928 C.P.D. 198). See *post*, p. 149.)

Obstructions

The mere depositing of road-making material immediately at the side of the roadway, which deposit prevents a driver from leaving the road in order to avoid an oncoming car on its incorrect side of the road, is not in itself a negligent act on the part of the Administration (*Featherstone v. Nicol N.O.*, 1952 (3) S.A. 275 (T)). It may, however, become negligence if there is no warning of the presence of such material to the driver at **night-time** (*ibid.*; *Finlayson v. Johannesburg Municipality*, 1925 W.L.D. 208), for, as was said by Wessels J. in *Volksrust Municipality v. Adendorf*, 1922 T.P.D. at 215, there is a wide difference between a person who runs into an object that is lawfully in the street—an object which stands out and is silhouetted against a background—and a person who runs into a **trap**. (See *post*, p. 208.)

Thus the failure to provide lights has entailed responsibility in the case of municipal councils, not only where there are holes in the streets but also where there are mounds of soil about 2 ft high on the side of the excavation (*Stewart v. City Council of Johannesburg*, 1947 (4) S.A. 179 (W)), for a failure to provide adequate lighting to prevent an injury may also be a ground of action (*Grahamstown Municipality v. Meyer*, 1951 (1) P.H., D. 14 (E); see also *post*, p. 203).

The liability of a divisional council, or road board in charge of the construction or repair of roads under its jurisdiction, in regard to obstructions, would be the same as that of any other local authority (cf. *Cape Town Municipality v. Lassen*, 1964 (3) S.A. 429 (C), for the facts of which see *post*, p. 147).

Not only the public body controlling the street but also private persons who cause dangerous conditions, may be deemed liable to damages for negligence. Thus in *Moore v. De Klerk*, 1950 (4) S.A. 470 (T), the trailer containing pigs' food had become detached from appellant's car with the result that the food had become precipitated on to the road. Realizing that the food made the road slippery and therefore constituted a danger to traffic, the appellant went to get the assistance of the police. Respondent's car skidded on the slippery surface of the road and was damaged. Held, that the appellant, in leaving the scene where dangerous substance lay unguarded, had acted negligently and that he was liable in damages.

Pleading

The absence of an allegation that the defendant controlled, occupied or owned the divisional road and causeway forming part of it, is fatal to a cause of action based either on nuisance or on negligence (*Searles, Ltd. v. George D.C.*, 1954 (2) S.A. 410 (C)).

(b) BRIDGES

The duty extends to the upkeep of bridges (*Jordens v. Cape D.C.*, 11 S.C. 158). It is not, however, an absolute duty, but a relative one according to the funds at its disposal and according to the nature of the locality (per Juta J.P. in *McArthur v. Clanwilliam D.C.*, 1914 C.P.D. 925; *Ray v. Herbert D.C.*, 1929 G.W.L. 10).

In regard to liability for the construction of bridges with adequate head clearance, the decision in *Lewys v. Burnett & Dunbar and another* [1945] 2 All E.R. 555 is instructive. In this case a railway company had constructed a bridge which had a head-room of 9 ft 3 in. (the statutory minimum being 9 ft). This head-room had, however, become diminished because, in compliance with its duty to spray and tar the highway under the bridge with tar and chippings, the level had been raised by 6 in. A passenger standing in a lorry, who did not know of the danger, was killed. Held, that his widow was entitled to damages.

Washaways

He who designs and constructs a bridge and its approaches is under a duty to members of the public to do so in such a manner that it will be capable of resisting all the violence of the weather which may be expected to occur, although perhaps rarely, in the locality in question, and where the bridge is constructed near the mouth of a river, the forces of nature, such as the winds and the tides of the sea and their effect on the river and the action of flood water on the river-bed and banks, must be taken into consideration by a reasonably careful man (*Administrator of Natal v. Stanley Motors, Ltd.*, 1959 (1) S.A. 624 (N), 1960 (1) S.A. 699 (A.D.)). (See, also, *Great Western Railway of Canada v. Braid* (P.C.) 8 L.T. (N.S.) 31 and *City of Montreal v. Watt & Scott, Ltd.* [1922] 2 A.C. 555 at 563 (collapse of railway embankment).)

Illustrative cases

Pretorius v. Divisional Council, Uniondale, 1939 P.H., O. 65 (C): Where the defendant council had allowed a hole, 8 in. deep, which had become filled with mud, to be covered with a thin layer of gravel which was unable to support the weight of a car, the Court held that the plaintiff was entitled to damages caused to him as a result of the wheel of his car sinking into this hidden danger and overturning the car.

Cradock D.C. v. Hume, 1 E.D.C. 104, 1 Buch. A.C. 27: Plaintiff's cart capsized owing to a wheel of his vehicle entering a hole caused by water from a clogged drain. Held, the divisional council was liable.

Cathcart D.C. v. Hart, 9 S.C. 80: Defendant council was held liable for introducing a new danger into a public, not proclaimed, road, consisting of a drain which threw a volume of water on to the road.

McArthur v. Clanwilliam D.C., 1914 C.P.D. 925: Plaintiff's motor-car broke a spring in a hole which could not have damaged a horse-drawn vehicle. No evidence that motors were used in the district. Held, in those days, that there was no duty to keep roads in a fit state for a mode of traffic which the council could not expect would come on them. Contrast *Kenhardt D.C. v. Linton*, 1914 C.P.D. 511, where the hole was so bad that, though the car slowed to 6 m.p.h., it nevertheless broke a spring.

Brain & Guthrie v. Aliwal North D.C., 1912 E.D.L. 319: Council by notice fixed width of roads at 20 ft, but allowed a rock to project into that width and a hole to form in the road just opposite to it. Plaintiff, in avoiding the hole, struck the rock and his horses bolted. Held, that the council was negligent, that there was no contributory negligence and that damages were recoverable.

Jordens v. Cape D.C., 11 S.C. 158: Plaintiff's cart, in trying to pass a wagon on a single-width bridge, went through the balustrade and over the edge. Held, the defendant was not liable as the bridge was sufficient for ordinary strains. *Potgieter v. Albert D.C.*, 1923 E.D.L. 485: 'There is no obligation to make a bridge of the very highest class, but one which, regard being had to the circumstances of the district and the funds of the council, would be safe for the ordinary traffic and the usual incidents of traffic.'

Niehaus v. Worcester D.C., 1932 C.P.D. 53: The council was deemed to be negligent for not giving sufficient warning of the fact that a bridge was under repair; but that the plaintiff was disentitled to succeed by reason of the negligence of his driver of the lorry in which he was a passenger, the driver having the last opportunity of avoiding the accident.

Administrator of Natal v. Stanley Motors, Ltd., 1960 (1) S.A. 699 (A.D.): When a bridge, or an embankment approaching a bridge, constructed to stand for a long period for public use, collapses and so causes injury to a member of the public owing to a failure to foresee a damming up of the river and consequent scouring away of the embankment, the Administration is liable in damages.

Victoria East D.C. v. Pieterse, 1926 E.D.L. 38: Council repaired a road with greasy pot-clay. Plaintiff's wagon slipped towards a precipice, the edge gave way, and the wagon went over. The council was held liable. Rain had fallen: but 'the obligations of divisional councils are not merely fair-weather obligations', and the rains were not extraordinary.

Ray v. Herbert D.C., 1929 G.W.L. 10: Plaintiff failed to prove that a dwarswal was in such bad condition as to establish negligence by the council.

Mossel Bay D.C. v. Oosthuizen, 1933 C.P.D. 509: Council held liable for allowing a drain-pipe to project into the trafficable portion of the road.

MUNICIPALITIES AND LOCAL AUTHORITIES

(a) PERMISSIVE POWERS

The municipalities and local authorities in the various provinces are vested with the control of the roads and streets within their area, and with the power to maintain and repair them. In the exercise of such powers, they are protected unless negligent (see *ante*, p. 49).

Unlike the divisional councils of the Cape Province, however, their powers, at any rate in respect of the repair and maintenance of streets, are **permissive** and not **obligatory** (*Liesbeek M.C. v. Partridge*, 4 S.C. 300). Whether the same is true of other powers is to be determined by construction of the relevant statutory provision. The power is given, but there is no duty to exercise it. (See also *Murray v. Bulawayo Municipality*, 1952 (4) S.A. 575 (S.R.), and *Davies v. Krugersdorp T.C.*, 1965 (4) S.A. 389 (W) at 393.)

The general principle is that a public body with permissive powers may be liable for not exercising those powers where its **prior act** has brought about a danger which ought to have been foreseen and might have been prevented by the exercise of care (*Cape Town Municipality v. Clohessy*, 1922 A.D. 4). Mere failure, however, to exercise the power entails no liability because 'there can be no *culpa* in a failure to do something in respect of which there is no obligation to do anything' (*Halliwell v. Johannesburg Municipality*, 1912 A.D. at 680). In effect, therefore, the position of the municipality under the statute is a particular application of the general rule of the common law, that no liability attaches to a **mere omission** or 'non-feasance' (see *ante*, p. 11), for the fact that a council is armed with authority does not mean that it is burdened with a duty of constructing or keeping in repair the streets and drains under its control (*Davies v. Krugersdorp T.C.* (*supra*) at 397; *De Villiers v. Johannesburg Municipality*, 1926 A.D. 401 at 403; *Van Wyk v. Hermanus Municipality*, 1963 (4) S.A. 285 (C)). Consequently where a municipality is empowered to capture and destroy stray dogs and had failed to exercise this power with the result that a neighbouring farmer sustained severe damage to his sheep by the dogs, it was ruled that the farmer had no cause of action because the negligence complained of was merely a failure to exercise its permissive powers (*Queenstown Municipality v. Wiehahn*, 1943 E.D.L. 134). Where, however, a municipality *decides to exercise its powers*, it then incurs the positive duty to take due precautions to see that its activity does not produce a danger. Because, though there is no liability for a mere omission, if by an act of commission a municipality creates a state of affairs which a reasonable man would realize might result, either immediately or at some future time, in danger to the public or to individuals, it is charged with the positive duty of taking active steps to guard against that danger. The new danger introduced must, however, be an appreciable one (*Murray v. Bulawayo Municipality* (*supra*)).

(b) REPAIR OF STREETS

A municipality is under a duty to guard against both immediate and prospective danger; and this includes a danger which may arise by the action of the elements or of ordinary wear by traffic. But the danger must in the first instance be created by the actions of the municipality. It must, as the phrase goes, have introduced a **new danger** (*Moulang v. Port Elizabeth M.C.*, 1958 (2) S.A. 518 (A.D.) at 521). Even though it may have exercised its power of construction or repair, it would not be liable for subsequent disrepair of the thoroughfare, unless it is established that some new danger was introduced by it (*De Villiers v. Johannesburg Municipality*).

ality, 1926 A.D. 401). This case clarifies the position of roads constructed under permissive powers—such as a National road.

Per Innes C.J. at 406:

‘For the appellant it has been argued that where a road authority with permissive powers does an act of repair or construction which would cause a reasonable man to foresee danger to the public in the future, then it must take suitable precautions. . . . But that proposition is too widely stated. Logically applied it would impose upon every road authority the obligation to keep in repair every thoroughfare which it had once made or amended. For no matter how sound the construction or how careful the patching, every road is bound, if not thereafter kept up, to become in process of time dangerous to those who use it.’

See also *Murray v. Bulawayo Municipality*, 1952 (4) S.A. 575 (S.R.). Consequently, where plaintiff fell into a trench, which had been partially roped off and where red lights had been affixed, the Court held that the defendant municipality had not been negligent in failing to cover up the hole (*Port Elizabeth Municipality v. Hartel*, 1940 E.D.L. 139). Per Pittman J., quoting De Villiers J.P. in *Hammerstrand v. Pretoria Municipality*, 1913 T.P.D. 377:

‘The law does not set up an impossible standard and it does not make extravagant demands. . . . A person (here the municipality) is entitled to assume that others will take reasonable care of themselves, will keep their eyes open, and will not take risks of which they are, or ought to be, aware.’

See, also, *Administrator, Cape v. Preston*, 1961 (3) S.A. 562 (A.D.) at 568. The mere fact that the local authority had sufficient funds to repair a road is no proof of the fact that failure to do so constituted an improper exercise of its discretion such as would render it liable for damages sustained as a result of such failure to repair (*Davies v. Krugersdorp T.C.*, 1965 (4) S.A. 389 (W)).

In *Scott v. Johannesburg C.C.*, 1962 (1) S.A. 654 (W), it was held that the subsidence of a concrete block in a pavement was so slight as not to import liability for *culpa* by reason of an omission to repair the pavement, seeing that the chances of harm were slight.

A municipality which embarks upon the laying of an electric cable, and the digging of a trench for that purpose, is not exercising permissive powers in regard to the **repair** and **construction** of streets or footways, in its capacity of ‘authorized undertaker’ for the supply of electricity in terms of Act No. 42 of 1922 (*Grahamstown Municipality v. Meyer*, 1951 (1) P.H., D. 14 (E)). If, however, it creates a potential danger, it is under a legal duty to take precautions to prevent its act from becoming an actual danger, and the mere failure to take such precautions will entail liability to any person to whom the duty is owed, and who is injured thereby (*ibid.*; and *Van Heerden v. Worcester Municipality*, 1946 C.P.D. 157). In this case, as plaintiff was walking in a street, she trod in, and sank into, the soil in a depression in a sidewalk. She fell and broke her leg. Per Sutton J., in quoting *Cape Town Municipality v. Clohessy*, 1922 A.D. 4, in dealing with permissive powers:

‘There is no duty to repair or maintain under the statute, and such a duty can only arise *de hors* in connection with the dangerous consequences of some prior act. The position then is this: A road authority with permissive powers is, speaking generally, liable for misfeasance, not for non-feasance. If it does construct or repair a road, it must do so in such a manner as not to create a danger to the

public for that would be a misfeasance. If in the course of construction or maintenance it introduces any material the result of which is to create a danger in the future, which would otherwise not have existed, then it must take steps to guard against or remove the danger as circumstances may require. Failure in that respect, though non-feasance only, would entail liability. But if it constructs or repairs a road using no material which either constitutes a danger at the time or creates a new danger in the future, then it is under no obligation to continue the upkeep. The mere fact that it has on occasion duly exercised its permissive powers does not impose on it a duty to maintain the improvement by executing repairs not obligatory under the statute.'

(c) NEW DANGER

Unless the plaintiff can establish that, after reconstruction or repairs, the defendant introduced a 'new source of danger' not existing prior to the making of a road, or the laying down of a pavement, he will be unable to fault the municipality on the ground of negligence (*Davies v. Krugersdorp T.C.*, 1965 (4) S.A. 389 (W); *Mouleng v. Port Elizabeth M.C.*, 1958 (2) S.A. 518 (A.D.) at 521). Unless, therefore, a new danger, which ought to have been foreseen, has been introduced, there will be no liability upon the defendant unless the plaintiff can establish that the latter was guilty of (a) defective workmanship or (b) using defective materials (*Cornah N.O. v. Durban C.C.*, 1958 (2) S.A. 140 (N)). In this case the municipality had used material which was not suitable for the locality and had caused a hitherto non-slippery road to become slippery and it was accordingly held liable in damages for its negligence.

The new danger will frequently consist in the introduction of some foreign body into the street (e.g. a pipe: *Stewart v. Bulawayo Municipality*, 1916 A.D. 357), or of the use for construction or repair of some unusual material which in course of time will become dangerous (*Halliwell v. Johannesburg Municipality*, 1912 A.D. 659). But the mere fact that, after repair or construction, a thoroughfare develops an inequality, does not establish that a new danger has been introduced, since all roads tend to deteriorate and wear into holes, and the acts of repair have probably lessened rather than increased the tendency. It follows that 'the due and proper employment of proper material for construction or repair cannot involve liability for the subsequent condition of the thoroughfare; it cannot create a new danger; no such danger can result unless the workmanship was defective or the materials improper' (*De Villiers v. Johannesburg Municipality*, 1926 A.D. 401 at 408). Accordingly there is no ground of action where a local authority had attempted to improve the drainage in a street but had failed to complete the work adequately, in the absence of proof that it had introduced a new danger (*Burton v. West Suffolk C.C.* [1960] 2 All E.R. 26 (C.A.)). The fact, however, that there had been a previous accident of a similar nature is certainly an element to be considered in finding negligence (*Administrator, Cape v. Preston*, 1961 (3) S.A. 562 (A.D.)).

In practice, therefore, for a plaintiff to establish liability against a municipality (or other similar body) in respect of the exercise of permissive powers of construction or repair, he must show either **defective workmanship** (which includes improper planning) or the use of **improper materials**, bearing in mind the reliance which the courts place on recognized trade and technical practice (see *Naanyane's case*, *post*, p. 151, and *Cornah N.O.*

v. *Durban C.C.* (*supra*) at 144–5). If a municipality does something which appreciably increases the likelihood of a common danger occurring, it is liable if it does not take reasonable precautions against such dangers (*Murray v. Bulawayo Municipality*, 1952 (4) S.A. 575 (S.R.)).

Where no **specific** source of danger has been introduced by the municipality the plaintiff can succeed only by proving what the condition of the road was before, as well as the condition of the road after, the work was done and by showing that the latter condition was more dangerous (*Moulang v. Port Elizabeth M.C.*, 1958 (2) S.A. 518 (A.D.) at 522). This rule undoubtedly creates a great hardship since, with the passage of time, it would be almost impossible for a plaintiff to prove what the prior state of the road or street was after the lapse of many years but, as stated by Schreiner A.J. (*ibid.*, at 522–3), to hold otherwise would be to discourage local authorities from making any roads at all. In *Preston's* case (*supra*) at 568–9, a new source of danger, i.e. a death-trap, had been introduced. (See also McKerron in (1958) 75 *S.A.L.J.* 259.)

(d) OBSTRUCTIONS IN STREETS

Where a local authority, while engaged on roadwork, erects in the middle of a busy thoroughfare a barrier consisting of a single line of barrels and visibility is poor, it is quite insufficient as a warning to motorists merely to set up a warning sign 'Drive Slowly'. It should also provide some form of adequate illumination to warn road-users of the presence of the barrier (*Capetown Municipality v. Lassen*, 1964 (3) S.A. 429 (C) at 433).

Other permissive powers

The same principles would apply to the exercise of other powers, e.g. planting of trees (*Pretoria Municipality v. Wolhuter*, 1930 T.P.D. 761), and to other bodies with permissive powers, e.g. provincial administrations (i.e. *Steyn v. Free State Administration*, 1927 O.P.D. 26). A municipality will be liable for flooding by water (*Eunson v. Port Elizabeth Municipality*, 1933 E.D.L. 237). It is also negligent not to discover, and take steps to remedy the dangerous nature of a depression or subsidence in a street although the original work was performed without negligence (*Newsome v. Darton U.D.C.* [1938] 3 All E.R. 93). In *Durban Corporation v. Milne*, 1939 N.P.D. 488, it was ruled that to leave an unlighted rail grinder in a street at night is an act of negligence.

(e) DANGER OF FIRE

Considerable difficulty is occasioned by the decisions in *Cambridge Municipality v. Millard*, 1916 C.P.D. 724, and *Conrad v. Cambridge Municipality*, 1921 E.D.L. 4, in both of which the municipality was held liable in respect of a fire originating in a street which the municipality had allowed to become overgrown with dry grass. It was not suggested that there was any act of commission by the municipality, or that the fire originated from any act of its servants. In *Conrad's* case, Sampson J. followed *Millard's* case, basing liability on the fact that 'by keeping the grassed street open and so inviting the public to use it, the municipality brought the danger of fire from acts of the public to the street'. In *Millard's* case, Searle J. in effect treats the matter as one of nuisance. These

decisions can be defended only if dry grass in a street can be regarded as a 'nuisance', but this can hardly be the case since grass as such cannot be regarded as being noxious to health nor dangerous to property nor detrimental to personal comfort (Wille, 5th ed., pp. 203–5). The obligation upon a municipality to take action in regard to nuisances is now permissive (section 129*bis*, Act No. 36 of 1919, as inserted by section 22 of Act No. 44 of 1952). These decisions may, accordingly, be regarded as not stating the correct legal position (Dönges and Van Winsen, *Municipal Law* (2nd ed.), p. 473). See, also, *Boucher v. Cape D.C.*, 1941 C.P.D. 291. In this regard it should be noted that there is a duty upon a municipality to interdict persons creating a nuisance upon its property (*Porter and others v. Cape Town C.C.*, 1961 (4) S.A. 278 (C)).

The true basis of action is therefore negligence, which can be found in the fact that a previous fire has originated in a dump shortly before the fire in question (*Durban C.C. v. S.A. Board Mills*, 1961 (3) S.A. 397 (A.D.)) or where the local authority has previously started a fire but failed to keep it under control (cf. *Fourie v. Sang*, 1924 O.P.D. 153).

Fire-brigade: A municipal council is under no legal obligation to equip and/or maintain a fire-brigade; consequently, if a fire emanates from land leased by the municipality to another and adjoining municipal land, it is not liable if the fire spreads to the land of the plaintiff, unless the latter can establish some ground of negligence by the municipality (*Van Wyk v. Hermanus M.C.*, 1963 (4) S.A. 285 (C) at 296). A council, and its fire-brigade members, are exempted against legal proceedings in respect of anything done by the fire-brigade, but this would not indemnify it or them where acts of negligence are complained of in the performance of its, or their, functions (Dönges and Van Winsen, *ibid.*, pp. 427–8).

Illustrative cases

Durban C.C. v. S.A. Board Mills, 1961 (3) S.A. 397 (A.D.): Where a fire, started by spontaneous combustion in a rubbish dump owned by the defendant, set alight stocks on the plaintiff's storage site and then spread to its factory it was held that, having regard to a previous fire in the dump, the municipality ought to have foreseen damage by fire and to have taken appropriate steps against its spreading.

Jordaan v. Worcester Municipality, 10 S.C. 159: A municipality with permissive powers to light and control streets was considered not to be liable to a pedestrian who fell into an uncovered and unlighted furrow at night. *Secus*, of course, of excavations made by the municipality, as to which see, for example, *Blumrick v. East London Municipality*, 1934 E.D.L. 24.

Halliwell v. Johannesburg Municipality, 1912 A.D. 659: The plaintiff was driving a horse and cart along a street when his horse slipped on certain cobbles which were originally rough and were properly laid, but had worn smooth and become dangerously slippery. Held, that the plaintiff was entitled to succeed in his action.

Bulawayo Municipality v. Stewart, 1916 A.D. 358: A pipe was inserted in a street. The pipe originally was covered but became uncovered. Held, that the municipality was bound to guard against the pipe becoming a source of danger to the public and it was accordingly liable to the plaintiff in damages. The same decision on similar facts was arrived at in *Hartnoll v. Cape Town Municipality*, 1922 C.P.D. 354, and *Finlayson's* case, 1925 W.L.D. 208 (tram-rails).

De Villiers v. Johannesburg Municipality, 1926 A.D. 401: The municipality constructed two dish-drains in a tarred street; the tar being carried to the lip of the drains. In course of time water eroded a hole 12 inches deep next to the lip. Held, as the work was properly performed with proper materials, no new danger had been introduced. Cf. *Clohesy's* case, 1922 A.D. 4 (tar-paved footway), and *Kerr's* case, 1915 W.L.D. 87.

Cape Town Municipality v. Foster, 1919 C.P.D. 70: In this case there was evidence that the tar-covering which had been put down was unusually slippery, but could have been made safe by gritting. Held, that the municipality was liable.

Nightingale's case, 2 S.C. 214: A municipality was held liable for constructing a bridge with no parapet.

Van Beek's case, 1 Buch. A.C. 101: The municipality was held liable for flooding by a defective drain. Cf. *Manuel's case*, 1877 Buch. 107. In *O'Shea v. Port Elizabeth Town Council*, 12 S.C. 146, it was held that, to take over as part of the municipal system a defective drain constructed by a private individual with the municipality's consent, was as much a misfeasance as if the municipality had itself constructed it. To allow a drain to become silted, and so cause flooding, entails liability (*Eunson's case*, 1933 E.D.L. 237). The liability for flooding by water involves peculiar rules of law, for which see *post*, p. 224.

Hughes v. Johannesburg Municipality, 1924 W.L.D. 5: Where a pre-existing furrow would in any event, by natural erosion, have prevented access to private property, a municipality incurs no liability in respect of prevention of access if it reconstructs the furrow and so increases erosion.

Luttman-Johnson v. S.A. Lighting Association, 1913 E.D.L. 257: *Quaere* whether unlighted lamp-standards in a street are dangerous objects against which a municipality must warn the public.

PRACTICE

In terms of section 266 of Ord. 19 of 1951 (Cape) no action against a municipality in respect of any neglect or default of such municipality may be taken unless, within **fourteen days** of the happening of the event or cause in respect of which damage is claimed, a written notice specifying the particulars of the cause of action, the default or neglect complained of and the damages claimed, is lodged with the town clerk. Power is given to the Supreme Court to grant relief where the municipality will not be prejudiced by the delay or where, owing to special circumstances, the plaintiff could not reasonably have been expected to have given the required notice (see *Stokes v. Fish Hoek Municipality*, 1966 (4) S.A. 421 (C) at 424). In this regard the court has an unfettered discretion (*Oosthuizen v. Fraserberg Afdelingsraad*, 1964 (4) S.A. 95 (C)). Similar **prescriptive provisions** apply in respect of divisional councils (*Oosthuizen's case (supra)* at 99). For cases where the court had refused to grant relief see *Ex parte Barnes*, 1941 C.P.D. 48, and *Rowley v. Willowmore D.C.*, 1944 C.P.D. 515. For the practice in other provinces see section 253 of Ord. 15 of 1935 (O.F.S.), section 172 of Ord. 17 of 1939 (T), and section 252 of Ord. 21 of 1942 (Natal). In the Transvaal, 30 days' notice of action must be given (*Ngobesi v. Johannesburg C.C.*, 1966 (2) S.A. 527 (W) at 528) and action must be brought within six months of the 'cause of action', i.e. the date of the accident (*Stoltz v. Pretoria City Council*, 1954 (1) S.A. 110 (T)). The Court will not, however, put a too strict interpretation on such notice as long as there has been a 'substantial compliance' therewith (*Osler v. Johannesburg C.C.*, 1948 (1) S.A. 1027 (W) at 1031). The purpose and object of such notice are that the municipality should have timeous notice to investigate and to meet the charge of negligence committed by its servants with reasonable promptness (*Pakco (Pty.) Ltd. v. Verulam T.B.*, 1962 (4) S.A. 632 (D); *Stevenson N.O. v. Transvaal Provincial Administration*, 1934 T.P.D. 80; *Osler v. Johannesburg C.C. (supra)*; *Stevenson N.O. v. Transvaal Prov. Adm.*, 1934 T.P.D. 80). In Natal a full month's notice must be given before action may be commenced

(*McDermot v. Durban C.C.*, 1955 (2) S.A. 198 (N), *Rail Supply Store v. Isipingo Beach T.B.*, 1957 (3) S.A. 70 (N)). The date, from which the six-month rule applies, runs from the day the plaintiff has, or could reasonably have had, **knowledge** of the act or omission complained of (*Desraj v. Durban C.C.*, 1964 (1) S.A. 427 (N); *John Newmark & Co. (Pty.) Ltd. v. Durban C.C.*, 1959 (1) S.A. 169 (D)). Nor would the prescriptive period run against a minor in law in respect of his claim against a provincial council (*Greyling v. Administrator, Natal*, 1966 (2) S.A. 684 (N); *President Insurance Co. v. Yu Kwam*, 1963 (3) S.A. 766 (A.D.) at 782) (see *post*, p. 515).

Waiver: The prescribed periods may be waived either expressly or impliedly by conduct (*Stander & Stander (Edms.) Bpk. v. Potchefstroom M.C.*, 1964 (2) S.A. 670 (T)) as, for example, where the municipality has filed affidavits (*ibid.*), but mere delay, occasioned by a consideration of the claim, does not amount to a waiver (*Steenkamp v. Peri-Urban Areas H.C.*, 1946 T.P.D. 424). Such delay may, however, in certain circumstances, amount to an estoppel (*Resisto Dairy (Pty.) Ltd. v. Auto Protection Insurance Co.*, 1963 (1) S.A. 632 (A.D.)). (See *post*, p. 524 f.).

Action: The written notice applies to all types of legal actions whether initiated by way of summons, notice of motion or by petition (*Ngobesi v. Johannesburg C.C.*, 1966 (2) S.A. at 528 (W); *Steelpark Estate Co., Ltd. v. Vereeniging T.C.*, 1963 (3) S.A. 657 (T)). But, in the Transvaal, no written notice is required in respect of a claim for interim relief, such as a temporary interdict (*Prinsloo v. Johannesburg C.C.*, 1969 (2) S.A. 355 (W) at 358). The position is otherwise in Natal where the Ordinance reads 'No legal proceedings' (*McDermot v. Durban Transport Management Board*, 1955 (2) S.A. 191 (D); *Mamasiya v. Durban Corporation*, 1955 (4) S.A. 208 (N)). A claim in reconvention, as where a municipality institutes an action, is not, however, revived after the period of six months has expired, but such defence of prescription is incompatible with the Apportionment of Damages Act (*Pretoria Stadsraad v. Public Utility Transport Corporation, Ltd.*, 1963 (3) S.A. 133 (T)) (see also *post*, p. 516).

Where such prescriptive period is set up to a claim it must be by way of a plea, and not by way of exception (*Shield Insurance Co., Ltd. v. Zervoudakis*, 1967 (4) S.A. 735).

PUBLIC OFFICIALS

'Where a legal duty is imposed by statute upon an individual, and no other remedy is expressly provided in case of non-performance, a person who, without contributory negligence, sustains damage by reason of such non-performance, is entitled to recover damages against such individual in the absence of proof that the duty was impossible of fulfilment' (*Jordaan v. Worcester Municipality*, 10 S.C. at 163; cf. *Patz v. Greene & Co.*, 1907 T.S. 427). But the duty must be both clearly and expressly imposed by law, and owed to the public; and the damages must be the proximate result of the breach (*Haarhoff's Trustee v. Frieslich*, 11 S.C. 339) (cf. *ante*, p. 5). This principle applies, where the necessary conditions are present, to officials. But even apart from the case of an express statutory enactment, if an official occupies a position in which it is his duty to deal carefully with the affairs of members of the public and if, in breach of such duty,

he negligently inflicts loss on them, there would appear to be no reason why he should not be held liable for such loss. While a subordinate official is subject to the direction and control of a superior, yet there subsists no relationship of master and servant between them; consequently the senior is not liable for the delictual misdemeanours of his junior unless it can be said that the latter acted on his instructions or that he was himself acting negligently or not performing his duty (see *Bainbridge v. Postmaster-General* [1906] K.B. 178; *Whittaker v. Roos*, 1912 A.D. 92; *Mersey Docks Trustees v. Gibbs*, L.R. 1 H.L. 124).

For acts done in a judicial or quasi-judicial capacity, however, there will be no liability without *dolus* (see *ante*, pp. 42–3).

Illustrative cases

Cape of Good Hope Bank v. Fischer, 4 S.C. 368: If a properly executed bond is presented to the Registrar of Deeds, he will be liable, for failure to register it, to the mortgagee. But is not liable to a cessionary, to whom he was under no legal obligation (*sed quaere*).

Haarhoff's Trustee v. Frieslich, 11 S.C. 339: A magistrate is not liable for a failure to exact security from a messenger; since the relevant statute (then Act No. 20 of 1856, Sch. B, section 5) does not impose such an express duty.

Sandilands v. Tomkins, 1912 A.D. 171: A gaoler is under a duty imposed by law to keep civil prisoners safely; and if he illegally releases one, he is liable to the creditor for all damage proximately resulting; but not for the full amount of the debt and costs. In this case there being no proof of damage, absolution entered.

Marsh v. Barry, 5 S.C. 217: Trustees in an insolvent estate are liable for negligence in realizing assets (sale of land on condition of purchaser finding sureties, condition improperly waived).

Messenger of the Court. The position of the messenger is special. If he attaches goods not in the possession of the judgment debtor, he does so at his own risk; if they are not the property of the debtor and are not properly executable, he is liable to the true owner for any loss, irrespective of actual negligence (*Weeks v. Amalgamated Agencies*, 1920 A.D. 218; see further, Jones and Buckle, 4th ed., p. 218).

Naanyane v. Administrator and Minister of Posts and Telegraphs, 1947 (1) S.A. 336 (O): The postal authorities, in erecting a telephone line, had planted a pole supported by a wire which projected into the ungravelled portion of a road (which was 68 ft wide) and 11 ft from the base of the pole and 8 ft from the gravelled portion. The deceased was galloping on the grassy portion of the road after sunset having left the gravelled part in order to avoid an oncoming car when he was struck by the wire stay and killed. Held, that neither of the defendants was liable in damages. Surely the whole road is for the use of wayfarers, and should it not have been held that this wire support constituted, at night, an invisible danger and something in the nature of a trap? It is submitted that this case was wrongly decided.

CHAPTER VIII

DAMAGE BY ANIMALS

SUMMARY

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Although the legal position in regard to damage by animals has been considerably clarified, in certain respects, by the decisions of the Appellate Division in *O'Callaghan v. Chaplin*, 1927 A.D. 310, and *S.A.R. v. Edwards*, 1930 A.D. 3, it is still far from clear in a number of other aspects. In this work it is proposed merely to state the present condition of the law as accurately as possible, and to give some indication of the points which still remain for future definition.

The subject may be conveniently divided into 'Damage to the Person and to Other Animals', 'Damage by Trespass', and Animals on Public Roads.

DAMAGE TO PERSONS AND ANIMALS

For damage to the person done by animals there were in Roman law four possible remedies: (1) an action under the *lex Aquilia*, (2) an *actio de pauperie*, (3) *actio de pastu*, and (4) an action based on the Aedilician Edict. Of these the first three certainly survive but the last is more doubtful.

1. ACTIO LEGIS AQUILIAE

If negligence can be established on the part of the defendant in relation to his custody or control of an animal, whether wild or domesticated, the ordinary action, based on the *lex Aquilia*, may be brought. In such an action it need not be established that the defendant was the owner of the animal; the **gist of the action is his personal negligence**. It must, however, be shown that the relationship of the defendant to the animal was such as to throw upon him the duty of preventing it from doing harm (as, e.g., in *Doig v. Forbes*, 7 S.C. 119; *Moubray v. Syfret*, 1935 A.D. 199, also *MacArthur v. Burn*, 1953 (2) S.A. 664 (S.R.); *S. v. Fernandez*, 1966 (2) S.A. 259 (A.D.) at 262, and see Hunt in (1962) 79 *S.A.L.J.* 326). This principle is similar, in many respects, to the doctrine of *scienter* of English law which postulates negligence founded on some prior knowledge or experience. (See *Gomberg v. Smith* [1962] 1 All E.R. 725 (C.A.) at 728-9.)

In order to establish negligence, therefore, it must be shown that the defendant *knew*, or should have known, of the likelihood that the animal was a dangerous or vicious one and would do harm, for a mere remote possibility is not enough (*Wasserman v. Union Govt.*, 1934 A.D. 228; *Robertson v. Boyce*, 1912 A.D. 367 at 373). All the circumstances must be taken into consideration, especially the place where the animal is allowed to be; so that what would be negligence in respect of a street may well be innocent in respect of a country road (*Moubray v. Syfret* (*supra*); *Slabbert, Verster & Malherbe v. Wilmot*, 1941 C.P.D. 9, and *Fourie v. Du Preez*, 1943 T.P.D. 50). The facts of the last-mentioned cases were that while respondent was taking a short cut through a fenced camp, where animals were grazing, he was set upon and injured by the dogs of the appellant, who was alive to the fact that *trespassers* might come into the camp and actually kept the dogs to ward off Native trespassers. Held, that the steps taken by the appellant were unreasonable, that he had been negligent and was liable in damages. (See also *R. v. Eustace*, 1948 (3) S.A. 859 (T) at 860.) (Compare *Watson v. Absche*, 1931 T.P.D. 499 (*post*, p. 159)).

(a) INHERENT PROPENSITY TO ATTACK

The risk of harm may arise from the **character of the particular animal**, or from the characteristics of the class of animal to which it belongs. Whether from past behaviour it should have been realized that the animal was dangerous or mischievous is pure matter of fact; but the general characteristics of the class or breed will, of course, be of importance (see, e.g., *Moubray v. Syfret* (*supra*) at 203; *S. v. Fernandez* (*supra*)).

As to the characteristics of the **class of animal**, considerable difficulty arises on the authorities from the fact that prior to *O'Callaghan v. Chaplin* it was generally thought that *culpa* was essential to liability for injury by animals; with the result that judges strained the facts to establish such *culpa*, and were prepared to find 'mischievous propensities' in normally

harmless animals. It is vital to realize (and many of the early cases are misleading here) that the question is not whether the animal is *ferae naturae* or not, but whether it has, or has not, as a class, mischievous propensities which make it *culpa* to allow it to be about unrestrained (*Robertson v. Boyce (supra)* at 379). The distinction between animals *ferae naturae* and animals *mansuefacta* (domesticated) appertains to the question of *pauperies*, not negligence. As was pointed out by Innes C.J. in *O'Callaghan v. Chaplin* (at 330), the class of animals *ferae naturae* could include the harmless hare.

Inherent in actions based on the *lex Aquiliae* is the rule that the **plaintiff's own negligence** was a bar to his action for damages, thus where plaintiffs who were slaughterers of cattle at an abattoir (the property of the defendant council) had paid a sum of damages to a person who had been injured by an ox belonging to plaintiffs, and had then sought to recover damages from the municipal council on the ground that the injury was due to the negligence of defendant's gatekeeper (in allowing the injured person to come into the abattoirs at a time when an escaped ox was loose), it was held that the failure to warn the injured party was not the cause of the accident, but such cause was to be found in the negligence of the plaintiffs in taking no proper steps to recapture the ox and that consequently the claim failed (*National Meat Suppliers (Pty.) Ltd. v. Cape Town City Council*, 1938 C.P.D. 498; see also *Klaas v. Serfontein*, 1940 C.P.D. at 621). Today he will have to submit to apportionment of damages.

(b) Dogs

The most difficult case is the dog. A line of cases has regarded the dog as an animal of inherently vicious propensities, and drawn the conclusion that it is negligence to allow it to be at large (see the dicta in *Robertson v. Boyce*, 1912 A.D. 339, per Innes J. at 344, Solomon J. at 347; and in *O'Callaghan v. Chaplin*, 1927 A.D. at 330). A dog, however, is not *ferae naturae* (see the last case, and *Double v. Delport*, 1949 (2) S.A. 621 (N), where it was held that the dictum of Kotzé J.A. in *O'Callaghan v. Chaplin*, 1927 A.D. at 368, states the law too widely in this regard). In addition, the Aedilitian Edict (for which see *post*, p. 161) classified dogs as dangerous animals. On the authorities as they stood, dogs, it seems, were classed as inherently vicious, so that to allow a dog to be at large is *culpa*, entailing liability, subject of course to any defences, apart from ownership. It is *probable*, however, that in cases where the principle of the edict does not apply (e.g. in the country), the earlier cases would now be reviewed, in the light of the principle applied in *Moubray v. Syfret*, 1935 A.D. 199, and *Wasserman v. Union Govt.*, 1934 A.D. 228, that it is *not culpa* to fail to guard against a mere possibility of harm, not amounting to such a likelihood as would be realized by the reasonably prudent man. This point was settled in *Double v. Delport (supra)*, wherein it was ruled that the mere presence of a dog on a street, unattended, does not per se create a presumption of negligence. A competent pleader should also plead *pauperies* (*ibid.*, at 625). But the facts averred in the pleadings may be found to include the *actio de pauperie* (*Maree v. Diedericks*, 1962 (1) S.A. 231 (T)).

In *Veiera v. Van Rensburg*, 1953 (3) S.A. 647 (T), on the other hand, the owner of a dog which was kept chained to a running wire, was deemed liable in negligence when a commercial traveller was bitten while visiting the premises in circumstances in which he did not see the dog or the warning notice.

The authorities do not appear to draw any distinction between a propensity to attack **human beings** and a propensity to attack **animals** (see *R. v. Eustace* (1), 1948 (3) S.A. 856 (T)), though in fact some such distinction seems almost inevitable, especially in the case of animals such as stallions. In *Mathiesen v. Dicks*, 1941 N.P.D. 349, the owner of certain dogs which had worried plaintiff's cow on a public road to such an extent that it died while trying to run away, was held liable to the owner of the cow. In *Bouwer v. Williamson*, 1954 (1) S.A. 522 (W), it was ruled that where an owner bred dogs known to be vicious, he was liable in damages when these dogs trespassed on to plaintiff's land where other animals were kept and attacked them.

Obstruction of vehicles

A distinction is, however, recognized between propensity to attack human beings and propensity to rush at vehicles. In *Robertson v. Boyce*, 1912 A.D. 339, Maasdorp J.P. and Solomon J. refused to extend the cases establishing the former propensity in dogs to cover the latter; Lord De Villiers appeared to take the opposite view, as did Kotzé J.A. in *O'Callaghan v. Chaplin* (at 368). If a dog rushes at a vehicle in a species of **attack**, this would probably now be treated as **pauperies** (see the next section). If it merely **obstructs** (e.g. by sleeping in the roadway), Kotzé J.A. says (l.c.) that 'there can be no doubt whatever that the owner will be liable, for it is his plain duty to keep the dog from being at large in the public street, but this dictum was held in *Double v. Delport*, 1949 (2) S.A. 621 (N) at 623 to have been too widely stated. Here it was ruled that merely to allow a dog to be in a public street does not amount to negligence on the part of its owner.

(c) HORSES AND CATTLE

With regard to horses, which clearly have a propensity to take fright and rush about to the danger of traffic, it will usually be negligence to leave them unattended either in a yard with access to the street (*Wiblin v. Webber*, 10 E.D.C. 71) or in the street itself (*Deen v. Davies* [1935] 2 K.B. 282; *Haynes v. Harwood* [1935] 1 K.B. 146). *Sephton v. Benson*, 1911 C.P.D. 502, where defendant's horse bolted while being harnessed with due care, is no doubt correct on the question of *culpa*; but would probably be decided otherwise now, on the ground of *pauperies*.

In *Botha v. Raubenheimer*, 1918 E.D.L. 200, Sampson J. refused to hold without evidence that stallions have a propensity to attack and kick mares.

As to negligence in driving cattle along a country road unaltered, see *Roche v. Louw*, 1916 C.P.D. 299, and *post*, p. 164. They probably have no propensity to *attack*; but if they are allowed to roam in a street, so as to cause obstruction, there may well be liability. (See *post*, p. 168.)

(d) BABOONS

Failure to keep a baboon in proper and secure captivity can be culpable for which the keeper may be held liable in negligence (*S. v. Fernandez*, 1966 (2) S.A. 259 (A.D.), and (1966) 83 S.A.L.J. 416).

It can be negligence of the owner of land to fail to maintain a proper fence in order to prevent his animals from straying and causing damage (*Coreejes v. Carnarvon Municipaliteit*, 1964 (2) S.A. 454 (C), and *Coetzee & Sons v. Smit and another*, 1955 (2) S.A. 553 (A.D.) at 560, considered *post*, p. 166).

(e) DEFENCES

The ground of action under the *lex Aquiliae* being negligence, the following defences are available to a party when sued on this cause of action:

- (a) **Contributory negligence:** As the plaintiff's claim is founded on negligence then the defence of contributory negligence would attract apportionment and if it is based on *pauperies* it would seem that the defence, that the plaintiff was negligent (e.g. in failing to see, or in ignoring, a well-placed notice warning intruders of the presence of a vicious dog or animal), would also be applicable (see *McKerron on Apportionment*, p. 4; *O'Callaghan v. Chaplin* (*supra*) at 329; *National Meat Suppliers v. Cape Town C.C.*, 1938 C.P.D. 498 (*supra*), see p. 154, and *Harmse v. Hoffman*, 1928 T.P.D. 572). In the last case the plaintiff stooped to pat a dog on whose paw he had trodden. The mere stroking or patting a strange horse or dog would, however, not necessarily amount to contributory negligence (*Smith v. Burger*, 1917 C.P.D. 662; *S.A.R. v. Edwards*, 1930 A.D. at 10; *Kuit v. Union-Castle Steamship Co.*, 22 S.C. 39).
- (b) **Provocation** will in most cases be regarded as a defence even though the animal was provoked by a third party (*S.A.R. v. Edwards* (*supra*)), although that third party would himself be liable in damages (see also *post*, p. 160).
- (c) Another defence is that the damage was due to pure **accident** (Voet 9.1.5). Thus in *Cowell v. Friedman*, 5 H.C.G. 22, where the plaintiff had been injured by a runaway horse belonging to the defendant it was ruled that since the cause of the fright of the horse was due to the breaking of one of the shafts of the vehicle to which it had been harnessed, there had been no negligence on the part of the defendant.
- (d) The fact that the plaintiff was a **trespasser**; for no duty is owed to the trespasser unless his presence should have been anticipated by the defendant (*Watson v. Absche*, 1931 T.P.D. 499; *Nicholson v. Morrow*, 1942 T.P.D. 315; *Fourie v. Du Preez*, 1943 T.P.D. 50). But an owner is only entitled to protect his property against possible trespassers in a reasonable way, that is to say he must erect an adequate notice of the presence of a ferocious dog on his premises (*Veiera v. Van Rensburg*, 1953 (3) S.A. 647 (T) at 654).

2. PAUPERIES

The *actio de pauperie* applies only when a **tame** animal does damage to someone, other than the owner, by acting *contra naturam sui generis*, i.e. contrary to the nature of its kind (*Coetzee & Sons v. Smit and another*,

1955 (2) S.A. 553 (A.D.)). Where, therefore a person, being lawfully in his place, is injured by an animal acting contrary to the nature of its kind, i.e. being motivated by some 'vicious, perverse or unwarrantable behaviour' (*Cowell v. Friedman & Co.* (1898) 5 H.C.G. 22 at 53) and without provocation on his part, the owner of such animal is liable to him in damages proximately resulting therefrom. (See also Hunt in (1962) 79 *S.A.L.J.* 329 and Wylie in (1934) 51 *S.A.L.J.* 176.)

There is a similar liability in respect of damage done to another animal, subject to the same conditions. **Liability rests upon ownership irrespective of culpa.**

The essentials to a successful action on this ground are:

- (a) The defendant is liable *qua* owner at the time of the injury.
- (b) The animal concerned must have been a domesticated animal (such as horses, mules, cattle or dogs).
- (c) The animal acted *contra naturam sui generis*, that is from some inward excitement, or vice.
- (d) The animal must not have been provoked.
- (e) The plaintiff was lawfully at the place in question.
- (f) There was no negligence on the part of the plaintiff.

(See *O'Callaghan v. Chaplin*, 1927 A.D. 310; *S.A.R. v. Edwards*, 1930 A.D. 3; *Smith v. De Smidt*, 1937 T.P.D. 8; *Nicholson v. Morrow*, 1942 T.P.D. 315; *Mathiesen v. Dicks*, 1941 N.P.D. 349; *Mehnert v. Morrison*, 1935 T.P.D. 144; *Veiera v. Van Rensburg*, 1953 (3) S.A. (T) at 651, and *Workmen's Compensation Commissioner v. Kaiser*, 1966 (2) P.H., J. 18 (N)—the headnote of which is misleading.) It follows, therefore, that where an animal acts *secundam naturam*, as where a trespassing ram serves plaintiff's ewes, the *actio de pauperie* is inapplicable (*Coetzee & Sons v. Smit and another*, 1955 (2) S.A. 553 (A.D.)).

The declaration should aver that the defendant's animal acted *contra naturam sui generis* (*Paul N.O. v. Rappoport*, 1949 (4) S.A. 537 (T), and *Smith v. De Smit*, 1937 T.P.D. 8); but the allegation may be implicit, provided it is a necessary inference from the facts alleged (*Maree v. Diedericks*, 1962 (1) S.A. 231 (T) at 232). If not so alleged, an amendment to include it would be allowed (*Geldenhuis v. Wilson*, 1949 (4) S.A. 534 (T)).

(a) OWNERSHIP OF THE ANIMAL

In Roman law, the action was noxal; and *nox a caput sequitur*. The action consequently lay against the person who was the owner of the animal at the time when the action was brought and not against the person who was the owner at the time when damage was inflicted. Noxal surrender is, however, no part of South African law. What then is the incidence of liability? Though it involves a complete departure from the original nature of the action, the position today is that liability attaches to the person who was owner of the animal at the time when the damage was done, it being an irrelevant consideration as to who is the owner at the time of the *litis contestatio* (*Batchoo v. Crick*, 1941 N.P.D. 19). Nor does the fact that the dog is under the control and custody of a third party affect the owner's

liability for its actions unless he is able to establish some negligence on the part of that third party (*Brown v. Laing*, 1940 E.D.L. 75). The death of the dog before the hearing of the case also does not affect his liability (*ibid.*).

Ownership must be established affirmatively by the plaintiff (*Brown v. Evans*, 1936 N.P.D. 310). In this case it was ruled that though the licences for the dogs were taken out by the father, who fed them and on whose premises they did the damage, the father had successfully shown that they belonged to his daughter.

Can there be ownership in **bees**, for the purpose of *pauperies*? In *Goosen v. Reeders*, 1926 T.P.D. 436, liability was based upon *culpa* in keeping a hive near a boundary. Animals having the *animus revertendi* are said to be owned while they have that *animus* (Inst. 2.1.15, where bees are specially mentioned).

In *Wasserman v. Union Government*, 1934 A.D. 228 at 230, however, it was ruled that there is no *culpa* per se in keeping a hive of bees, or allowing bees to hive in the roof of one's house.

(b) CONTRA NATURAM

The conception of *pauperies* is that there has been fault in the animal; something corresponding to *culpa* in a human being (per De Villiers C.J. in *S.A.R. v. Edwards*). If the animal is of the class of domesticated animals, which includes at any rate horses, mules, cattle, and dogs, it is considered to act *contra naturam sui generis* if, acting from 'inward excitement, or as it is also called, **vice**' (*sponte feritate commota*), it makes an **unprovoked** attack on either human beings or other animals. But if it is of the class of **wild animals** (*ferae naturae*), the doctrine of *pauperies* has no application, because it is of the nature of wild animals to behave wildly. If, however, the *domesticated* animal acts not through vice but under provocation, its acts are not *contra naturam* and no liability for *pauperies* ensues.

The principle underlying the *contra naturam* idea is that domesticated animals (*mansuet naturae*) should not behave in an aggressive fashion towards human beings or towards other animals. It is, in a sense, the nature of a mule to kick; but a domesticated mule which draws a vehicle in a public street behaves *contra naturam* if it kicks at a pedestrian, even though the pedestrian passes close to its hind legs (*Edwards's* case).

Considerable difficulty is raised when the conception is applied to the behaviour of animals towards one another, particularly such animals as stallions and bulls. In *Edwards's* case, De Villiers C.J. refers to certain puzzling passages in the *Digest* dealing with horses; and it would not be difficult to postulate equally perplexing problems with other animals. In *Botha v. Raubenheimer*, 1918 E.D.L. 200, Sampson J. refused, without evidence to that effect, to hold that it is the nature of a stallion to attack a mare; in *Parker v. Reed*, 21 S.C. 496, De Villiers C.J. regarded an unprovoked kick by one horse at another as *contra naturam*, which is clearly correct. It is clear that as between two animals, the owner of the animal which was the aggressor will be liable for damage done (Voet 9.1.5; Dig. 9.1.111; *Marks v. Savory*, 1917 S.R. 18). Where, however, an animal acts upon its own procreative instinct, it cannot be said to be acting *contra naturam* (*Coetzee & Sons v. Smit and another*, 1955 (2) S.A. 553 (A.D.) at 558).

Still greater difficulty is caused by the authorities which regard certain domesticated animals as possessing inherently vicious propensities. The principal case is that of the dog (see *ante*, p. 154); but the same has been said of a bull (*Hall v. Masea*, 23 S.C. 746, as to which case, however, see *Moubray v. Syfret*, 1935 A.D. at 210). The only possible conclusion from the authorities is that an animal may have a natural inborn propensity to attack human beings or other animals, and yet act *contra naturam* if it gives way to the propensity; which though queer logic may be sound practical common sense from the point of view of the injured person.

The *onus* of establishing conduct *contra naturam* (i.e. that the animal acted from some inward excitement or vice) is on the plaintiff (*Smith v. De Smidt*, 1937 T.P.D. 8). But it is *prima facie* discharged by proving that the animal acted in aggressive fashion without apparent cause (*S.A.R. v. Edwards (supra)* at 12). To escape liability the owner must then prove either that it was the fault of the plaintiff or that there was provocation by some extrinsic cause (*ibid.*). In *Brown v. Laing*, 1940 E.D.L. 75, it was ruled that, where the facts showed that defendant's dog had entered plaintiff's property and had jumped upon plaintiff's child as she was putting some food into her mouth and had bitten and scratched her, it must be presumed—in the absence of sufficient evidence to the contrary—that the dog acted from some inward excitement or vice and not from hunger or from being teased or provoked.

Obstruction of vehicles

The question of obstruction to traffic by an animal, from the point of view of negligence, has already been considered. From the point of view of *pauperies*, the problem is simpler. There can be little doubt that an *actio de pauperie* would lie where an animal deliberately rushed at a vehicle in a sort of attack. There is nothing in *Robertson v. Boyce*, 1912 A.D. 339, to the contrary. Probably any wanton rushing about would similarly be regarded, if it was due to 'vice', which would include mischief. *Sephton v. Benson*, 1911 C.P.D. 502, where a horse, while being harnessed, suddenly bolted, and the defendant was held not liable since there was no *culpa*, would probably now be decided otherwise; though for a horse to take fright legitimately from some cause outside the control of the owner would not be *pauperies* (*Cowell v. Friedman*, 5 H.C.G. 22 (*ante*, p. 157)). Paulus, in Dig. 21.1.43, commenting on the Aedilician Edict, says that 'mules which for no cause become alarmed and rush about are said to be *vitiosa*'; but this may be meant of *contractual* 'vice'. (See also *post*, pp. 164–5.)

(c) PROVOCATION

If there has been provocation (*concitatio*), then, as has been said, the conduct of the animal is not *contra naturam*, and there is no liability for *pauperies*. The provocation need not proceed from the plaintiff. Provocation is not so much a defence as an element which prevents the plaintiff from establishing his cause of action. Apart from provocation, the negligence of plaintiff will constitute a defence; as in *Harmse v. Hoffman*, 1928 T.P.D. 572, where plaintiff, having trodden on a dog, bent down to pat it and was bitten. But the imprudence of stroking or patting a strange horse

or dog will not necessarily debar plaintiff's action (Voet 9.1.5, 6; *S.A.R. v. Edwards*, 1930 A.D. at 10).

Provocation, it should be noted, need not necessarily amount to contributory negligence; if it is such as to excuse the behaviour of the animal, then no cause of action *de pauperie* is made out (*Edwards's* case at 10, proposition (9); see *ante*, p. 159).

If the animal was provoked by some third person or animal, the plaintiff's remedy would, naturally, lie against such third person (*S.A.R. v. Edwards* (*supra*) at 10, and Voet 9.1.4).

A horse cannot be said to have acted from some inner vice where the cause of its reaction is due to an accident, such as where the shafts of the vehicle to which it was attached had broken and struck the horse's leg causing it to take fright and thereafter injure the plaintiff (*Cowell v. Friedman*, 5 H.C.G. 22).

(d) PLAINTIFF LAWFULLY THERE

The right to recover in the *actio de pauperie* is subject to the limitation that the plaintiff was lawfully at the place where he was injured (*O'Callaghan's* case, at 328–9). This has been interpreted to mean that the evidence must show, not only that he entered the premises with a lawful object, but that he had a legal right to be there (*Watson v. Absche*, 1931 T.P.D. 499). This decision seems to go rather far (see *McKerron on Delicts*, 6th ed., pp. 239–40, and *Maasdorp*, vol. IV, 4th ed., pp. 83–4), but as it has been followed in *Nicholson v. Morrow*, 1942 T.P.D. 315, and in *Mathiesen v. Dicks*, 1941 N.P.D. at 354, it must be regarded as a rule of law. Per Carlisle J., quoting Innes C.J., in *O'Callaghan's* case:

'A trespasser upon property, if he were bitten by a watch-dog, could not sue the owner merely because he was the owner. . . . He might conceivably, and under special circumstances, base his claim on *culpa*; but not on ownership.'

Perhaps the better way of posing this question is to ask, can the owner (defendant) show that the plaintiff had no right to be there? (See *Salmond*, p. 494.)

It follows that a stranger, who enters a fenced camp for the purpose of inquiring the way, will have a ground of action *de pauperie* if his **presence** should have been **anticipated** (*Fourie v. Du Preez*, 1943 T.P.D. 50; *ante*, p. 156). No doubt there is no liability to the unexpected trespasser; but to the person who though not invited is permitted to come on private property there will be liability. Thus in *Veiera v. Van Rensburg*, 1953 (3) S.A. 647 (T), it was decided that a commercial traveller was entitled to recover damages for a bite sustained from a dog while he was talking to the owner's wife at the front door, he not having seen the dog nor the warning notice which was in an inappropriate position.

It is for the defendant, when sued, to show that the plaintiff was unlawfully at the place where she was injured (*Mehnert v. Morrison*, 1935 T.P.D. 144). In this case, where it was impossible on the evidence to determine whether the plaintiff was injured on defendant's property or in the street, she was held entitled to recover.

The same requirement (of being lawfully where injured) exists in the case of damage to animals (see, e.g., *Drummond v. Searle*, 1879 Buch. 8; *Holmes v. Beest*, 1914 C.P.D. 708).

(e) NO CULPA ON PLAINTIFF'S PART

A plaintiff is not entitled to recover damages where his own fault or *culpa* leads to the injury to him or to his property, and there is no justification for such a narrow construction of what should be deemed to be the injured person's fault as to limit it to instances 'where he has himself provoked the animal or has acted in such a way that the outburst could reasonably have been foreseen' (*Meladu v. Rabe*, 1951 (1) P.H., J. 3 (C)).

(f) WILD ANIMALS

There is no liability *de pauperie* for the acts of wild animals, since they act *secundum naturalem feritatem*. The confused language of the *Institutes* (4.9.1) does not establish the contrary view. Liability for damage by wild animals must be based either on negligence, or on the Edict. For wild animals occurring naturally, not brought upon the land, there will normally be no liability (*Sambo v. Union Govt.*, 1936 T.P.D. 182: lions in Kruger Park straying beyond its boundaries).

If an animal of the class *ferae naturae* is in fact domesticated and kept as a pet, it is possible that the doctrine of *pauperies* would be applied to it; but this will seldom if ever be necessary, since to allow an animal *ferae naturae* to be at large will be negligence (see *S. v. Fernandez*, 1966 (2) S.A. 259 at 260 (A.D.)).

(g) JOINT ATTACK

Where two or more animals act in concert, then if it is possible to sever the damage, the owner of each is liable for the damage done by his animal. But if it is not possible to sever, the owner of each animal is, in accordance with the general rule (*post*, p. 283), liable for the whole damage (*Graan v. During*, 2 S.C. 308; *Nel v. Halse*, 6 S.C. 275; *Katz v. Bloomfield & Keith*, 1914 T.P.D. 379).

3. THE AEDILITIAN EDICT

An edict of the aediles of Rome, who controlled the streets and markets, forbade the keeping, in a place where the public came and went, of certain animals. The list as given in the *Institutes* (4.9.1) is 'a dog, a wild boar, a pig, a bear, a lion'; as given in the *Digest* (21.1.40) it is 'a dog, a lesser boar, a pig, a wolf, a bear, a panther, a lion'; to which Paulus in his commentary adds, 'and generally, any animal which may do harm, whether free or bound, so that it cannot be held in by bonds from doing damage'. Contravention, if it resulted in the death of a free man, entailed a penalty of 200 *solidi*; if a free man was hurt the penalty was discretionary; other damage must be paid in double (21.1.42). The prohibition was apparently against allowing the animals to be loose, or not so chained up that they could not do damage (see Gothofredus's note to D. 21.1.40). The generalization by Paulus to include any dangerous animal is no doubt authoritative.

The Edict is treated by many of the Roman-Dutch authorities as of general applicability in Holland, though the double penalty became obsolete (see per Innes C.J. in *O'Callaghan v. Chaplin*, 1927 A.D. at 319; per Kotzé J.A. at 341, 346, 351). But, as stated by Innes C.J., these authorities do not clearly distinguish between the various remedies (the Edict, *pauperies*, and the *lex Aquilia*); and the principal effect of the Edict in

Roman-Dutch law seems to have been to confirm the authorities in their classification of the dog as a dangerous animal.

Is the Edict part of the law of South Africa; and if so, what is its effect? The observations of Wessels J.A. in *O'Callaghan's* case (at 377) are undoubtedly cogent. But in view of the expressions of opinion of Innes C.J. and Kotzé J.A. in the same case (at 325, 330, 368) it seems extremely probable that it would be held to be still in force.

As to its effect: It prohibits the **bringing** of the named **animals, or any other dangerous animals, into a public place** (*quo vulgo iter fit*), which no doubt must be in a town or village, not in the country. Breach of such prohibition is *culpa* in the wider sense ('statutory *culpa*'); so that if damage results it will presumably not be possible to plead that all reasonable precautions were taken; though contributory negligence will induce apportionment of damages and *vis major* a good defence. As to the animals covered, they are in general of the class of **wild animals**; but with the curious addition of the (tame) pig, and the dog. Wessels J.A. would read this to mean *ferocious dog* (*O'Callaghan v. Chaplin* (*supra*) at 371). If the edict survives, as it probably does, its effect must be to penalize any person who is responsible for the bringing of any ferocious dog into a public place, if damage proximately results. The liability is not in the owner, but in the person **in control** of the animal, i.e. the person who brought the animal on to the public place. But the damage must surely be such as should be anticipated from the presence of a dangerous animal, dangerous, that is, in the sense of a propensity to attack human beings or animals; not, with submission, damage caused by the passive obstruction of traffic (as suggested by Kotzé J.A. in *O'Callaghan v. Chaplin* (*supra*) at 368), which must be dealt with on the ground of ordinary *negligence* (see *ante*, p. 153).

4. DAMAGES

All damage proximately caused will be recoverable (*S.A.R. v. Edwards*, 1930 A.D. 3), including nervous shock (*Crydt-Ridgway v. Hoppert*, 1930 T.P.D. 664). But where a sheep had trespassed on plaintiff's land, and it was alleged that in consequence plaintiff's cattle, alarmed at the presence of this strange animal, drove it away from them and in so doing damaged his vines, the damage was held too remote (*Van der Byl v. Richter*, 1921 C.P.D. 316). Where two animals act in concert, the owner of each will usually be liable *in solidum* for the whole damage, in accordance with the usual rule (*Graan v. During*, 2 S.C. 308; *Nel v. Halse*, 6 S.C. 275; *Katz v. Bloomfield & Keith*, 1914 T.P.D. 379).

Illustrative cases

Dogs. *O'Callaghan v. Chaplin*, 1927 A.D. 310: Plaintiff's young child was taken by his nursemaid to defendant's house to visit defendant's maid. The nursemaid was admitted by defendant's servant. In the house, defendant's dog bit the child. Held, Wessels J.A. dissenting, that defendant would have been liable on the ground of his ownership of the dog; but that (per Innes C.J.) the invitation to enter, if it fell within the authority of the servant, was coupled with the condition that the nursemaid should exercise proper care of the child, which she had not done. Per Kotzé J.A. the injury to the child was the result of the want of care of the nursemaid.

Mathiesen v. Dicks, 1941 N.P.D. 349: The appellant's dogs had run off his premises, barked at a cow, worried it and caused it to rush off in an endeavour to escape. While

making this attempt it fell and died. Appellant disclaimed responsibility on the grounds that respondent had allowed his cow to wander on to the road unattended in contravention of section 10 of Act 42 of 1898, and claimed that this negligence was the proximate cause of the cow's death. Held, respondent had rightly been awarded damages.

Robertson v. Boyce, 1912 A.D. 339, 1912 T.P.D. 381: Plaintiff on a motor-bicycle collided with defendant's dog. The dog ran across the path of the cycle, barking. Held per De Villiers C.J. that as dogs have a propensity to run after, and in front of, vehicles, the defendant was guilty of negligence in allowing it to be at large, but that plaintiff was guilty of contributory negligence. The dog was acting in accordance with its savage propensities when it made an attack upon the cycle or its occupants. Per Solomon and Maasdorp JJ., the defendant was not guilty of *culpa* in allowing the dog to be at large; it was not proved that the dog had attacked the plaintiff. Per Solomon J., a long line of cases establish that dogs have a propensity to attack human beings and animals; but these cases have gone very far; and the rule should not be extended to a propensity to bark at, and rush before, vehicles; in such cases knowledge of the propensity in the particular animal must be established. Per De Villiers J.P., there being evidence that his particular dog had the propensity, defendant was guilty of *culpa* in allowing it to be at large. (In the court *a quo*, Wessels J. proceeded on the lines of the judgment of Solomon J. in the appeal court.) Action dismissed (Innes J. and De Villiers J.P. dissenting).

In *Double v. Delport*, 1949 (2) S.A. 621 (N) at 623-4, it was considered by De Wet J. that the decision in *Robertson v. Boyce* had gone rather too far and held that it is not negligence merely to allow a dog to stray on a public street unless it had a habit of running after and snapping at strangers riding on bicycles.

Maree v. Diedricks, 1962 (1) S.A. 231 (T): Defendant's fox terrier trespassed on plaintiff's property, entered his fowl run and destroyed eleven fowls. Held, defendant was liable in damages.

R. v. Eustace (1), 1948 (3) S.A. 856 (T): At the trial of an accused for culpable homicide, in which he was charged with failing to keep under his control a dog which he knew to have vicious propensities, as a result of which it killed a child, the Court refused to follow the English doctrine of *scienter* and also refused to exclude all evidence of the dog's propensity to attack other dogs; first because the Court was of the opinion that the dog's entire history as known to the owner had to be investigated; and, secondly, because the evidence at the preparatory examination showed that the deceased on the day in question was accompanied by two dogs.

Harmse v. Hoffman, 1928 T.P.D. 572: Plaintiff, in moving from one public room to another in an hotel, trod on defendant's dog which was lying down there. The dog yelped; plaintiff bent down to pat it and the dog bit him in the face. Held, that his injury was due to his own act, 'by no means reprehensible but imprudent', in bending down to pat an unknown dog; that consequently the injury was not caused either by the dog behaving *contra naturam*, or by the negligence, if any, of defendant in allowing the dog to be there. Both De Waal J.P. and Barry J. seem to take the view that it was negligent of the defendant to allow the dog to be where it was (see *ante*, p. 156).

Watson v. Absche, 1931 T.P.D. 499: *Quaere* whether it is negligent to allow an Alsatian dog to be at large on private premises (a large garden surrounding an isolated house in a suburb). (Surely not.) Held, in any event, plaintiff's conduct in entering such a place at night was imprudent and she brought her injury on herself; and could not recover either on the ground of *pauperies* or of negligence.

Nicholson v. Morrow, 1942 T.P.D. 315: Mrs. G visited respondent's house in order to deliver eggs which had been ordered from her daughter. On respondent's premises her grandchild, who had accompanied her, was bitten by respondent's dog. Held, that as it could not be said that the child was an invitee or was lawfully on the premises, the respondent was not liable in terms of the *pauperien* action.

Fourie v. Du Preez, 1943 T.P.D. 50: The respondent, while taking a short cut through appellant's fenced camp where animals were grazing, was set upon and injured by dogs kept by the appellant for the purpose of keeping off Native trespassers. Held, that the steps taken by the appellant were unreasonable, that he had been negligent, and was liable in damages.

Kuit v. Union-Castle Co., 22 S.C. 39: Defendant, who had knowledge of vicious propensity in a dog, chained it up where passengers might come. There being no satisfactory

proof of provocation by plaintiff, the defendant was held liable. Cf. *Smith v. Burger* 1917 C.P.D. 662, where plaintiff was a child and there was some evidence (not very satisfactory) that she had fondled the dog in a public street; and *Story v. Stanner*, 1 H.C.G. 40.

Doig v. Forbes, 7 S.C. 119: The defendant had control of a dog though he was not owner. He knew of its vicious propensity but allowed it to go loose. It trespassed on plaintiff's property; plaintiff threw a stone at it whereupon it bit him. Held, that the plaintiff was not guilty of contributory negligence: 'an owner would naturally throw a stone at a trespassing dog'; *secus* perhaps if he knew it to be vicious.

McLaren v. Nightingale, 1911 T.P.D. 889: A and B were sitting in a public park, each with a dog. A third dog came up and fought with B's dog. B tried to get away, but A's dog then bit her. B recovered damages from A.

Mehner v. Morrison, 1935 T.P.D. 144: Where the evidence was inconclusive as to whether plaintiff's wife was bitten on a private footpath on defendant's land or in the public street, it was held that, as the onus lay on defendant to show that she was where she had not a right to be, she was entitled to recover.

Le Roux v. Fick, 1879 Buch. 29: The defendant's dog, taken by him on a public road, attacked and killed plaintiff's ostrich, lawfully on the commonage. Held, applying the Aedilician Edict, that the defendant was liable. For other cases of attacks by dogs on animals, see *Nel v. Halse*, 6 S.C. 275; *Graan v. During*, 2 S.C. 308; *Katz v. Bloomfield*, 1914 T.P.D. 379. In *Drummond v. Searle*, 1879 Buch. 8, trespassing ostriches were damaged by defendant's dogs; there was no recovery of damages. Cf. *Holmes v. Beest*, 1914 C.P.D. 708.

Monkeys and Baboons. Monkeys are *ferae naturae*; it is negligence to allow them to be where they can do harm. In *Beatty v. Donnelly*, 1876 Buch. 51, an action was based on an allegation of negligence in allowing the monkey to escape. No knowledge of specially vicious habit was proved. The magistrate gave absolution; but the Supreme Court held that he was wrong and sent the case back. In *Myburg v. Jorgenson*, 1914 E.D.L. 89, a monkey was, with defendant's consent, tethered on his erf in such fashion that it could reach the public road and do damage; but it was not owned by or under the control of defendant. Held, defendant was not liable.

S. v. Fernandez, 1966 (2) S.A. 259 (A.D.): The appellant was charged with culpable homicide in that he had failed to keep a baboon in a sufficiently safe cage, it having broken out therefrom, and having snatched a baby from a perambulator and bitten it. Thereafter, intimidated by a shot fired by the accused, it threw the baby down and retreated into its cage. Held, that as the accused had the custody and control of the baboon, and had failed to keep it safe while he was repairing the cage, he had rightly been convicted.

Ostriches. Whether ostriches are *ferae naturae* or not has not been decided. The only case is *Spies v. Scheepers*, 3 E.D.C. 173, where there was knowledge of viciousness but defendant established *volenti non fit injuria*.

Meercat. In *Kleim v. Boshoff*, 1931 C.P.D. 188, plaintiff's wife and child were invited to defendant's house, where a tame meercat was allowed loose. The animal tripped the child, which fell upon it and was bitten; the mother was also bitten in defending the child. Plaintiff recovered damages in respect of both on the ground that a person who keeps a vicious animal such as a meercat on his premises is under a duty to see that it is not a danger to persons lawfully on the premises. A tame meercat is perhaps a domesticated animal, but, of course, to allow a wild animal to be about would be negligence towards an invitee.

Horses. Horses have no propensity to attack *human beings*. But it is *pauperies* for a draught-mule to kick at a pedestrian without provocation. In *S.A.R. v. Edwards*, 1930 A.D. 3, it was held not to be provocation (or contributory negligence) to pass within 3 feet of the hind legs of a mule in a busy street. Plaintiff, being kicked, fell under a passing tram; held that his damage was not too remote.

As to attacks on animals: In *Botha v. Raubenheimer*, 1918 E.D.L. 200, plaintiff sued for damages to his mare by defendant's stallion, running on the commonage. Sampson J. gave absolution in the absence of evidence that a stallion had a propensity to attack mares by kicking or biting. The case, of course, was prior to *O'Callaghan v. Chaplin*

(*supra*). In *Chandler v. Middelburg Municipality*, 1924 T.P.D. 450, where a mule, left unattended in a street in contravention of a by-law, attacked plaintiff's dog, Mason J.P. founded his decision on the breach of the by-law, while Krause J. founded it on negligence.

Horses no doubt have a propensity to take fright and rush about. It is therefore in most cases negligence to allow a horse to stand unattended either in a street (*Deen v. Davies* [1935] 2 K.B. 282; *Haynes v. Harwood* [1935] 1 K.B. 282) or in a yard having access to a street (*Wiblin v. Webber*, 10 E.D.C. 71). If a horse, when being driven, bolts without any negligence in the driver there is no liability (*Sephton v. Benson*, 1911 C.P.D. 502; *Cowell v. Friedman*, 5 H.C.G. 22); but if there was negligence either in the driving (*Packman v. Gibson Bros.*, 4 H.C.G. 410), or in the harnessing (*Page v. Malcomess*, 1922 E.D.L. 284), there will be liability. In *Lindeque v. Hall*, 1927 T.P.D. 417, it was held to be negligence to allow a horse, not secured, to walk into a street. In *Katz v. Webb*, 1930 T.P.D. 700, A left a horse unsecured in a yard, where it interfered with B's horse, which ran into the street and injured the plaintiff. There being evidence that A should have appreciated the danger, A was held liable.

As to whether the mere fact that a horse, being driven in harness, bolts, raises an inference of negligence, see *Cowell v. Friedman* (*supra*); *Gibson v. Otto*, 8 H.C.G. 193; *Cape Town Council v. S.A. Breweries*, 1912 C.P.D. 307; *Viljoen v. Cardoo Bros.*, 1925 C.P.D. 273, and cf. the chapter on Proof.

The *Digest* has some curious passages on the behaviour of horses: see the judgment of De Villiers C.J. in *S.A.R. v. Edwards*, 1930 A.D. at 10.

Cattle. Oxen and cows as a class probably have no propensity to attack human beings or other animals; so that to allow them to be at large will not be negligence in this respect, though it may well be in respect of trespass or of obstruction. But a particular animal may be shown to be vicious, and for an animal to attack will be *pauperies*. In *Jordaan v. Smith*, 1915 E.D.L. 166, where defendant's ox attacked plaintiff's horse on a commonage, it was held there was no negligence; but now the plaintiff would recover on *pauperies*. In *Roche v. Louw*, 1916 C.P.D. 299, it was held not to be negligence to drive unhaltered cattle along a public road in the country.

Slabbert, Verster & Malherbe, Ltd. v. Wilmot, 1941 C.P.D. 9: In a claim for damages caused to a motor-car in a collision on a misty night with a cow, the evidence was that the cow had been driven to the abattoirs, became restive and was driven in the afternoon into a roadside camp which was fenced and to which the public had access; that it was left there for the night and that it later left the camp and charged the car on the road. Held, on appeal that the plaintiff had failed to prove that the defendant had been negligent in leaving the animal in camp without insuring that it would not stray on to the public road.

Klaas v. Serfontein, 1940 C.P.D. 616: Although there is a regulation by the divisional council providing that no person shall depasture or allow cattle or livestock of any description to stray on any road controlled by the council it was ruled that, as no steps had been taken to fence both sides, it was doubtful whether a farmer could be held guilty of negligence (contributory) in failing to observe such regulation.

As to **bulls**, in *Hall v. Masea*, 23 S.C. 746, De Villiers C.J. said that a bull is ordinarily an animal with vicious propensities; and where a bull was allowed to be at large near a public road, and it attacked and gored plaintiff's ox drawing a wagon on the road, there was deemed to be *culpa* in the owner. Cf. *Webster v. Muller*, 1913 E.D.L. 482, where the bull got on to the commonage, and *Lujoko v. Symmonds*, 1911 N.P.D. 326, where a bull being grazed with a herd of cattle, saw a strange bull at a public watering place and attacked it. These cases, however, on the issue of *culpa*, must be regarded as subject to some doubt since *Moubray v. Syfret*, 1935 A.D. 199. In that case, in Rhodesia, a bull was allowed to run with the herd in a camp through which ran a public road. The Court held that in the absence of proof of knowledge of vicious habit in the particular bull, it was not negligence to allow it so to run. Wessels C.J. founded principally on the ordinary practice in a pastoral country, on the onerous duty which would otherwise be imposed on farmers, and on the duty of road-users to exercise reasonable care for their own safety. His Lordship speaks of a 'normal bull, which is not ordinarily ferocious'; and says that it is 'not negligent per se to allow bulls to roam with herds unattended, or to drive bulls with the herd on a public road running through the farm'. De Villiers J.A. founded his decision on the rule that precautions need not be taken

against a mere possibility of harm, not amounting to such a likelihood as would be realized (and guarded against) by the reasonably prudent person; so that though all bulls are liable to become vicious at times and attack strangers, an owner is not bound by law to take precautions against that mere possibility. These observations are remarkable when one compares the attitude of the courts in the parallel case of dogs. It must therefore be taken that to allow a bull to be at large on a farm is not per se negligence, even though it has access to a public road: but knowledge of vicious habit, or any other circumstance which strengthens the mere possibility of attack into a likelihood, will alter the position. For a bull to attack will, of course, be *pauperies*, in the absence of incitement. (*N.B.*—In *Moubray v. Syfret* defendant was not the owner, but a possessor under hire-purchase.)

As to the extent of absolute liability under the Cape Pound law see *Constant v. Louw*, 1951 (4) S.A. 143 (C).

Where a neighbour had failed to maintain his part of the common fence with the result that his cows were injured by defendant's bull, it was ruled that his contributory negligence deprived him of his right to damages (*Rawlinson v. Buys*, 1952 (4) S.A. 109 (N)). Today he would have to submit to a reduction of damages (see Act No. 34 of 1956).

Bees. Whether bees are capable of ownership is discussed in the text above (p. 158). They are no doubt *ferae naturae*, incapable of *pauperies*. But it is negligence to keep a hive in such a position that there is a likelihood of the bees doing injury either to human beings or, presumably, to animals. In *Goosen v. Reeders*, 1926 T.P.D. 436, defendant was held liable for *culpa* in keeping a hive within 6 yards of his boundary. In *Wasserman v. Union Govt.*, 1934 A.D. 228, however, it was decided that the occupier of a building is, in general, under no duty to take steps to eradicate a swarm of bees which have hived in the roof of a building. In this case the bees were not brought to the property but came there naturally, and plaintiff's husband, when ordered or requested to try to find out where they were located was stung in looking out of the window and died. It was held that there was no negligence in giving the order, since the risk of injury was a mere possibility and not a likelihood such as the reasonable man would have guarded against.

Sheep. *Shapiro v. Castle Wine & Brandy Co., Ltd.*, 1939 C.P.D. 215: The plaintiff, while travelling along a main road at a speed of 40 to 45 m.p.h., collided with certain sheep of the defendant with the result that considerable damage was done to his car. It appeared that the sheep had been grazing in a camp adjoining the road under the charge of a young herd-boy, and it was proved that the camp was, to the defendant's knowledge, insufficiently fenced to prevent the sheep from getting on to the road. They had rushed across the road in an unusual and abnormal manner and there was nothing to show that they had been frightened or chased. Held, in an action based on *culpa* (not *pauperies*), that it could not be said that a reasonable man in the position of the defendant should have foreseen that his sheep would behave in the unusual and abnormal manner described.

Coetzee & Sons v. Smit and another, 1955 (2) S.A. 553 (A.D.): Defendant's rams broke through the common fence between his and plaintiff's property and served the latter's ewes. Plaintiff failed to establish negligence on the part of the defendant and was unable to rely upon the *actio de pauperie*, by reason of the rams acting *secundum naturam sui generis*. Nor did the *actio de pastu* apply since the rams had not eaten any of plaintiff's foliage.

TRESPASS BY ANIMALS

On the subject of trespass by animals there is remarkably little authority, due no doubt to the effect of the pound laws.

There cannot be *pauperies* for grazing or other similar damage, since this is not *contra naturam* (Voet 9.1.1). In Roman law there was an ancient action, the *actio de pascu pecoris*. This was noxal; liability was independent of negligence, but the animal could be surrendered in full satisfaction (Dig. 15.5.14.3; Lee, *Introd.*, 2nd ed., appendix K; Voet, l.c.). By various local statutes the practice of impounding was either introduced or regularized (Grot. 3.38.11; Groen. *ad Dig.* 9.2.39.1; Van Leeuwen, *Cens. For.*,

1.5.31.4), and this, no doubt in Holland as in South Africa, was the ordinary remedy. Voet says (9.1.3) that 'in other respects [i.e. except in respect of impounding] the Roman law on the subject of trespass is still in force'. This common law remedy is therefore still to be in force in South Africa; but, of course, without the right of surrender (*Van Zyl v. Kotze*, 1961 (4) S.A. 214 (T) at 216). In *Thomson v. Schietekat*, 10 S.C. 46, the plaintiff recovered damage without allegation or proof of *culpa*. In *Cowell v. Friedman*, 5 H.C.G. 22, and *Sephton v. Benson*, 1911 C.P.D. 502, there was held to be no liability in the absence of *culpa*; but the Court expressly followed *Parker v. Reed*, which has been overruled by *O'Callaghan v. Chaplin*.

Under common law, therefore, there is an absolute liability independent of negligence, for damage caused by trespassing animals, in respect of damage by grazing (*Van Zyl v. Kotze* (*supra*)). Such liability is independent of the statutory remedy of impounding, which does not exclude it (*Thomson v. Schietekat* (*supra*)); but the plaintiff must make his choice (see Act No. 15 of 1892, section 75). Actual damages will have to be proved under the common-law action (*Conradie v. Gray*, 21 S.C. 454; *Rabie v. Olifant*, 1 E.D.C. 362).

The fact that the land, which has been trespassed upon, was **not fenced** or otherwise enclosed, or that the cattle of the defendant encroached upon the premises owing to a disrepair of the fences, will be no defence to an action. The position would, naturally, be otherwise if there existed some obligation on the plaintiff by contract or otherwise to fence his ground or to keep his fences in repair (*Adams v. De Klerck*, 16 S.C. 456).

The liability extends only to damage by grazing; there is no authority for extending it to other forms of damage, or to animals which do not graze (*Coetzee & Sons v. Smit*, 1955 (2) S.A. 553 (A.D.)). Nor can it extend to wild animals, unless possibly where the owner of land has *collected* wild animals on his land. It will be a defence that the escape of the animal was due to the act of a third party (Voet 9.1.1), or to *vis major* or to the fault of the plaintiff; but the fact that the plaintiff has not fenced his land will be no defence (*Boss v. Whyte*, 1906 E.D.C. 313).

This absolute liability may be compared with the similar rule of English law; but there is a similarity and no more, and English decisions would be very unsafe guides for our courts. In particular, there seems to be no exception in our law, as there is in English law, in the case of cattle driven along a highway, and trespassing therefrom. (See *post*, pp. 168–71.)

Absolute liability is in the **owner**, as in *pauperies*. In addition, there will be liability for negligence in the person in actual control of the animal.

As to whether an inference of negligence can properly be drawn from the fact that the animal has strayed much depends on the exact circumstances of the case (see p. 172). It is, of course, the duty of one who causes animals to be driven along a highway, or across private property, to take proper steps to prevent them from straying or trespassing (*Boss v. Whyte*, below).

Illustrative cases

Thomson v. Schietekat, 10 S.C. 46: On an allegation that plaintiff was the owner of a place, that certain sheep came into his garden and did damage, and that defendant owned the sheep, the Court, allowing an appeal, entered judgment for plaintiff for £1.

Held, that the Pounds Act of 1892 does not bar the common law claim (see section 75), unless damages under the Act have been claimed.

Boss v. Whyte, 1906 E.D.C. 313: The defendant, in the exercise of a right of servitude, drove cattle across plaintiff's land, and allowed them, on more than one occasion, to trespass into plaintiff's crops and do damage. Damages of £25 were awarded. 'In exercising his right it was incumbent on defendant to do so in a manner not injurious to plaintiff; it is the duty of defendant to send his animals properly attended. The fact that defendant allowed gaps in his fences affords no justification or excuse.'

Septon v. Benson, 1911 C.P.D. 502: Defendant's horse, while being harnessed, suddenly took fright and bolted, eventually coming upon plaintiff's farm, where it frightened plaintiff's horse which injured itself. Held, that there was no *culpa* in defendant or his servant, and consequently (following *Parker v. Reed*) no liability. The case is still good authority on the issue of *culpa*. It seems doubtful whether in any event, the rule of absolute liability for trespass would attach to damage of this kind; or even to this kind of trespass; but the act of the horse was probably *pauperies*.

Kock v. Klein, 1933 C.P.D. 194: A flock of sheep in charge of one herd was being driven along a public road over plaintiff's farm. Two sheep strayed; the herd abandoned the flock and pursued the two sheep for a long time, during which the flock spread over the farm and became mixed with plaintiff's sheep. Held, that the herd, in abandoning the flock, had been negligent. Per Watermeyer J.: 'A good deal may be said in favour of the view that it is negligence to send a flock of 250 sheep across a farm in charge of only one shepherd; but in the absence of evidence I do not think the Court is in a position from its own knowledge to say that this is so.' In *Fraserburg D.C. v. Van Wyk*, 1927 C.P.D. 285, will be found certain dicta as to trespass by animals driven along public roads.

ANIMALS ON PUBLIC ROADS

The problem of the presence of *mansuetæ naturæ* (tame animals), such as sheep, horses, oxen, donkeys and goats, straying, or being herded, upon public roads and thereby constituting serious danger to motorists has evoked an ever-increasing concern during the past few decades both in the courts and by the legislature. The seriousness and importance of peril has increased progressively as the economy of the country has developed from farming to industrial dimensions and has, as a consequence, produced a number of inconsistent decisions until the provincial administrations have been induced to provide certain penal sanctions to remedy the matter, to wit, section 125 (as amended by section 10 of Ordinance 26 of 1968) and section 126 (Cape); section 125 (as amended by section 13 of Ordinance 145 of 1968) and section 126 (Transvaal); sections 125 and 126 of Ordinance 21 of 1966 (O.F.S.), and section 125 of Ordinance 21 of 1966 (Natal). See *post*, p. 170.

(a) COMMON LAW

The underlying concept in the earlier authorities has been that animals of the aforementioned nature have just as much right to the public thoroughfares as other road-users and that drivers of vehicles knowing of the unpredictability in behaviour of such animals, should keep a keen look-out for their presence and make proper allowances for their irresponsible movements. Another consideration, motivating the various decisions in this regard, has arisen from a judicial policy of refraining from discouraging the growth of important farming ventures such as sheep and cattle breeding and a consequent reluctance to impose 'intolerable or unnecessarily onerous conditions' upon farmers (*Moubray v. Syfret*, 1935 A.D. 199 at 203), and this consideration is in accord with the dictum of Schreiner J.A. in *Herschel v. Mrupe*, 1954 (3) S.A. 464 (A.D.) at 477,

but that would surely apply only to the cost of fencing, and not for the provision of properly equipped and responsible cattle- or animal-herds. Nevertheless, farmers have been accorded remarkably sympathetic treatment, as for instance in *Roche v. Louw*, 1916 C.P.D. 299, where it was held that it is not negligence to leave uncontrolled cattle upon a main road at night-time, nor to allow animals to roam thereon unattended. See *Moubray v. Syfret* (*supra*) where a bull charged and damaged the car of plaintiff who was held to be remediless, although Wessels J. did add a rider by saying that

‘On the other hand the owner of cattle which are apt to stray on a public road must use reasonable care to see that he does not, on his farm, expose the travelling public to dangers of his cattle which he ought both to foresee and avoid’.

Similarly, in *Shapiro v. Castle Wine and Brandy Co.*, 1939 C.P.D. 215, it was ruled that where the defendant had left sheep in charge of a very young herd-boy, which sheep had strayed on to a road, a reasonable man would not have been expected to foresee that they would act in an ‘unusual or abnormal manner’ in running across the road and into the way of an approaching motor vehicle, and the same *ratio decidendi* was applied in *Gessner v. Stainbank*, 1944 N.P.D. 300, which also ruled that the motorist was without remedy, in spite of the terms of section 66 of Ordinance 10 of 1937. Nor was the motor-driver able to succeed in *Klaas v. Serfontein*, 1940 C.P.D. 616, where the owner of a horse, which had at night-time sprung from behind a bush into the driver’s way, was exculpated from liability. Similarly in *Slabbert, Verster & Malherbe v. Wilmot*, 1941 C.P.D. 9, it was ruled that no *culpa* could be attributed to the defendant for leaving his cow in a camp from which it might stray on to the highway.

In view of the numerous decisions postulating negligence on the part of a motorist for failing to anticipate that animals on a road may act in a stupid and unreasonable manner (see *post*, pp. 425–7), it seems anomalous and indeed paradoxical that a farmer, or agrarian land occupier, should be exempted or exculpated from liability when he fails to foresee that his own animals are prone to act in the same irrational and irresponsible manner when confronted with a motor vehicle upon a highway. In *Klaas v. Serfontein* (*supra*) at 621–2, Jones J. doubted, but did not decide, whether a breach of the regulations, prohibiting animals to be on a highway, could be ‘binding on a farmer’. The general effect of the aforementioned decisions would therefore appear to predicate that the motorist proceeds on roads in ‘cattle country’—which would include Bantu locations and tribal land areas—at his own risk. (See also Luntz in (1965) 82 *S.A.L.J.* at 150–2.)

The same degree of solicitude for the rural landowner of animals is evidenced in the English decisions; see *Brock v. Richards* [1951] 1 All E.R. 261 (C.A.), where it was ruled that an occupier of land, bordering a highway, is under no legal duty to prevent his animals from straying on to a highway unless they were known to him to be dangerous owing to their frolicsome nature or that they were mischievous.

In *Gomberg v. Smith* [1962] 1 All E.R. 725 (C.A.), a **shop-owner** was deemed to have been negligent for allowing his St. Bernard dog to be upon a road without a lead with the result that it collided with and damaged

plaintiff's van. Here Halroyd Pearce L.J., after considering the decision in *Searle v. Wallbank* [1947] 1 All E.R. 12 (H.L.), said: 'The law on the subject is difficult, archaic and ill adapted to urban communities.' See also *Pitcher v. Martin* [1937] 3 All E.R. 918 (K.B.), where it was ruled that to allow a dog to be uncontrolled in the streets of London constituted a nuisance and that the plaintiff pedestrian was entitled to succeed in her claim for damages. Again in *Hughes v. Williams* [1943] 1 All E.R. 535 (C.A.) Lord Greene expressed strong disapproval of the rule, exempting owners from liability when their animals escape on to highways, but felt he was bound by it. His hopes that the House of Lords would take a different view were not, however, fulfilled in *Searle v. Wallbank* (*supra*). The latter case dealt with the matter of maintaining hedges in a proper condition and ruled that there was no obligation upon the landowner to prevent the escape of animals through them (see *post*, p. 171, in relation to 'Adequate fencing').

On the other hand, and prior to the enactment of the Provincial Ordinance provisions relating to the straying of animals on to public roads, it was decided in *Katz v. Webb*, 1930 T.P.D. 700, that where a tame and aged horse had broken loose from its tether at a **smithy** and had run out on to a road where it had injured plaintiff, the defendant was liable in damages since his servant had been specially warned to keep an eye on it as another horse had shown hostility to it, *culpa* being based on the inference that the horse had escaped owing to lack of ordinary care. Similarly in *Page v. Malcomess & Co.*, 1922 E.D.L. 284, where the defendant's servants had affixed a bridle in an incompetent manner while harnessing a high-spirited and restive horse to a wagon, with the result that it shook off the bridle, bolted and collided with the plaintiff's motor-car, it was ruled that the plaintiff was entitled to his damages. Moreover in *MacArthur v. Burn*, 1953 (2) S.A. 664 (S.R.), it was ruled the plaintiff owner of cattle, being driven along a road at night-time without any warning lights, had been guilty of contributory negligence but that the defendant motor-vehicle driver had had the 'last opportunity' of avoiding the collision. (It should be noticed, however, that in Rhodesia there is no Apportionment of Damages Act (cf. *Keevy v. Deis*, 1965 (4) S.A. 106 (S.R.)). See also *Cromhout and Dewing v. Green*, 1942 E.D.L. 238.

(b) LEGISLATIVE PROVISIONS

Straying: After considerable pressure by the Automobile Association of S.A. and the general public the provincial legislatures of the various provinces have almost similar enactments, sanctioned by penal consequences, in regard to the culpability of permitting the presence of animals upon public roads. All the provinces now provide, in section 125(1) of each Ordinance, that:

'No person shall leave or allow any bovine animal, horse ass, mule, sheep, goat, pig or ostrich to be on any section of a public road where such section is fenced or in any other manner enclosed on both sides, and no person shall leave such animal or ostrich in a place from where it may stray on to any such section of a public road'.

To this provision there are certain logical exceptions, as are provided in section 125(2) of each Ordinance, namely where:

- (a) any animal is being ridden or is being used to draw a vehicle along a public road; or
- (b) any animal which is being driven from one place to another in such manner as not to constitute a source of danger or injury to any person or vehicle using such road.

Presumption: In any prosecution for a contravention of section 125(1) it shall be presumed, until the contrary is proved, that any animal or ostrich was left or allowed to be on the section of a public road or place concerned by the owner of such animal or ostrich. Furthermore, a section of a public road shall be regarded as being fenced or enclosed on both sides even though there is an opening providing access to such road in the fence or other enclosure.

Despite these provisions the difficulty would yet remain, from a practical point of view, of establishing the ownership of the animal, or ostrich, in question since instances do occur where the servant in charge thereof disappears after the collision and cannot be found or traced thereafter.

The operative words in these provisions are 'leave' and 'allow'. The essence of the word 'allow' connotes both 'knowledge and consent' (*R. v. Khwaza*, 1954 (3) S.A. 253 (E); *Cape Town Council v. Benning*, 1917 A.D. 315 at 319), for there must be some sanction, either direct or indirect, on the part of the person sought to be obligated (*Cole v. Union Government*, 1910 A.D. 263 at 270; *Alexander v. Johns*, 1912 A.D. 431 at 445). The effect of such provisions is that the onus, which rests on the accused person, is that he must satisfy the court that there has been no measure of intention or negligence on his part. If there is a doubt on this point then he has not disposed of this onus (*Mouton v. R.*, 1958 (2) P.H., H. 326 (C)).

A similar enactment was considered in the case of *S. v. Smith*, 1965 (1) S.A. 491 (E), where it appeared that the accused's gate had been found open by the police, who had closed it and chased the cattle back into the camp. The cattle had again strayed on to the road the following day when the gate was again found to be open. The gate was closed by means of a catch for the purposes, and the Court held that the accused had failed to discharge the onus resting on him since the gate could have been kept shut by the simple device of having it locked at night. On appeal, however (1965 (3) S.A. 545 (A.D.)), the aspect of locking the gate was not dealt with and it was found that the accused had taken reasonable precautions to prevent his cattle going through the gate since the cattle, being dehorned, could not themselves have opened the gate and that the accused could not be expected to provide against the actions of trespassers (*ibid.*, at 549). Possibly, had it been shown that the accused had, or should have, been aware of such malpractices of trespassers, the decision would have gone the other way. In *S. v. Coetzee*, 1963 (1) S.A. 361 (G.W.), it was ruled that the word 'opening' in the definition of the fenced road must be given its ordinary meaning and is not to be limited to openable openings, i.e. gates, and consequently the conviction of the accused, for leaving his animals in a place where they might stray on to a public road, should be confirmed. For the criminal liability in South West Africa, resting upon the owner or person in control of animals who fails to see that such animals do not constitute an obstruction to others and cause an accident, see *S. v. Kamfer*, 1965 (1) S.A. 521 (S.W.A.), where the conviction was upheld.

Warning Lights and Red Flags: During the hours half an hour after sunset and half an hour before sunrise all drivers and herders of animals are now under a statutory obligation to give due warning of the presence of such animals on public roads by carrying a red light, visible from a distance of at least 500 feet and, if there are more than ten animals present, there must be two lights displayed, one by a person behind and one by a person in front of such animals (section 12 of Ordinance 7 of 1968 (T) and section 10 of Ordinance 27 of 1969 (C); section 125(4) (N) and (O).

During daylight such drovers are obliged to carry a red cloth, of not less than 12 inches square when in charge of a flock or herd exceeding ten in number. Section 125(5) of all the Ordinances stipulate that every person in charge of an animal on a public road shall tend it in such a manner as not to constitute an obstruction or danger to other traffic. This provision would, *semble*, imply an obligation to keep the animals on one side of the road in order to enable vehicular traffic to pass the animal or herd in safety. While the statutory obligation is upon the herders and drivers of animals there would, presumably, be a vicarious responsibility upon the owners of such animals to provide the necessary red lights and/or red cloths for their servant herders and drivers for the purpose required, and also to take reasonably adequate steps to ensure that they are properly displayed.

Statutory Culpa? In view of the decisions (cited *ante*, pp. 5-7) and in particular the dictum of Aitkin L.J. in *Philips v. Britannia Hygienic Laundry* [1923] 2 K.B. 832 at 841, and also the words of Viscount Simonds in *Grant v. National Coal Board* [1956] 1 All E.R. 682 (H.L.) at 684 and of Lord Reid at 867-8 thereof, dealing specifically with obstructions on public roads, it is submitted, since the aforementioned provisions relating to the straying of animals and to the carrying of warning lights at night-time and red cloths during daylight are for the express purpose of protecting vehicle drivers on public roads, particularly motorists, that a breach of such statutory provisions may be taken into consideration in civil actions for damages sustained by a plaintiff as a result of collisions with such animals, since there is (a) clearly a legal duty cast upon the animal owner or custodian and (b) the motorist falls within the class of persons whose protection of whom the legislature manifestly wished to ensure. (See also *Bellsted v. S.A.R. & H.*, 1936 C.P.D. 339 at 406, followed in *R. v. De Bruyn*, 1953 (4) S.A. 206 (S.W.A.) at 212.) It is therefore submitted that the doubts expressed by Jones J. in *Klaas v. Serfontein*, 1940 C.P.D. 616 at 621, are not justified.

Other decisions: In *Prinsloo v. Girardin*, 1962 (4) S.A. 391 (T), the defendant, who was a farmer, had, after purchasing a number of oxen and mules at an auction sale, commissioned two Natives to drive the animals back to his farm. He had supplied them with a torchlight as a warning to motor traffic but, after a collision at night-time between plaintiff's vehicle and two oxen, they had disappeared. Plaintiff could not see the oxen until he was 8 yards from them, and here it was found that the defendant had been negligent and had, accordingly, to suffer an apportionment of damages. In order to impute liability upon a defendant for allowing animals to stray on a public road it is necessary both to aver and to prove that the road was fenced on both sides (save in Natal) (*Van der*

Merwe v. Austin, 1965 (1) S.A. 43 (T)). In *Bhyat's Store v. Van Rooyen*, 1961 (4) S.A. 59 (T), Bresler J. said (at 62):

'Animals left unattended at night on the road present entirely unexpected and invisible obstacles to users of the road (*Cromhout v. Dewing*, 1942 E.D.L. 238). In England the subject of animals on the roads has been fully treated in *Deen v. Davis* [1935] 2 K.B. 282 (C.A.), from which it appears that a person who brings a domestic or harmless animal on to the highway owes a duty to use all reasonable care to prevent such animals from causing damage to others. In circumstances negating the absence of negligence or wilful intention, a person who causes animals to be left unattended may be mulct in damages.'

In this regard the realistic approach of Colman A.J. (as he then was) in *Nebel v. Eloff*, 1963 (3) S.A. 674 (T), should be noted. Here, in distinguishing *Moubray v. Syfret* (*supra*), he held that, even in cattle country, a motorist is not obliged so to regulate his conduct that he will be able to avoid an accident if an animal, or number of animals, suddenly emerge on to the carriageway ahead of him from a place where they were not previously visible and at a stage when he was in close proximity to them. Again, in *Bondcraft (Pty.) Ltd. v. City View Investments (Pty.) Ltd.*, 1969 (1) S.A. 134 (N), where the defendant, the owner of cattle, had been negligent in allowing his animals to be upon a fenced national road at night-time in circumstances wherein there was nothing to suggest that their black colour obliged the plaintiff to anticipate their presence on the road, it was held that the latter was entitled to succeed in his claim for damages.

Gates: In *Kruger v. Coetzee*, 1966 (2) S.A. 428 (A.D.), the judgment of the court below in favour of the plaintiff was reversed. Here it appeared that the defendant's horse had strayed from his premises on to a public road at night-time and had suddenly emerged from the darkness into the car of plaintiff's husband. It appeared that a water-scheme tunnel was being constructed in the vicinity and drivers on the new road often left the defendant's gate open. Defendant was aware of this and twice went to the council authorities and complained that their employees were not closing the gate. He also complained to those in authority at the tunnel. He himself did not leave the gate open and had often closed the gate when he found it open. In this case it was held that the defendant had taken all reasonable precautions and, since there was no investigation by the plaintiff as to the cost to the defendant of maintaining a team of herds or gatekeepers day and night to prevent his animals from passing through this gate which other persons had carelessly left open, and as no evidence as to the feasibility of defendant's fencing off a new camp for his animals, nor evidence of the possibility of constructing a motor by-pass with a cattle-grid at the scene of the gate, or the cost thereof, the defendant could not be mulct in damages on account of any alleged negligence on his part. In neither of the reports of this case were the statutory provisions, relating to the offence of leaving an animal in a place where it might stray, referred to or considered, although it was clear that the road was fenced in on both sides.

(c) ADEQUATE FENCING

From the various decisions in English law it would appear that they have been motivated partly by the fact that fences are rare in that country,

since most domains are divided off by stone walls or hedges, and partly by the fact that the feudal moat-to-castle notion persists that such demarcations are designed primarily to keep strangers and trespassers out of the land in question rather than to keep animals inside the premises concerned (cf. *Gomberg v. Smith* [1962] 1 All E.R. 725 (C.A.) at 277). Consequently the courts have been reluctant to impute liability to land-owners for negligence in failing to keep their hedges in such a condition that they are adequate enough to prevent animals straying through, or jumping over them (see *Brock v. Richards* [1951] 1 All E.R. 261 (C.A.)).

In our own courts it has been held that there is no obligation upon a farmer to **erect** a fence along a **National road** which runs through his farm (*Van der Merwe v. Austin*, 1965 (1) S.A. 43 (T) at 47, where Boshof J. applied the principle enunciated in *Moubray v. Syfret* (*supra*), and see (1965) 82 S.A.L.J. at 150).

Once erected by a landowner, however, for the purpose of keeping his animals from straying, there is a duty upon him to see that it is kept in order and free from holes or openings therein through which his animals can pass (*Coreejes v. Carnarvon Munisipaliteit*, 1964 (2) S.A. 454 (C)) and, should he fail in his duty in this regard, he may be held liable in damages since this is a foreseeable risk against which the landowner should have provided (*ibid.*). Per Beyers J.P., with Van Winsen J. assenting, at 457:

'Na my oordeel dus, as daar 'n plig op die eerste verweerder gerus het om te sorg dat hierdie heining doeltreffend is, dan het hy daardie plig nie nagekom nie, dan was hy in verband met hierdie uitoefening van daardie plig nalatig. Hier het ek geen twyfel nie dat waar eenmaal 'n heining, 'n draadheining, opgerig langs 'n openbare pad, dit die plig is van die eienaar van daardie heining om te sorg dat die heining doeltreffend is in soverre dit rederlikerwyse gedoen kan word en om die stappe te neem, wat 'n versigtige redelike man onder die omstandighede sou geneem het om te sorg dat sy heining aan die doel beantwoord waarvoor hy daar is. Doen hy dit nie dan skep hy 'n wanindruk by die publiek wat daardie pad gebruik; die publiek wat die pad gebruik en sien dat dit omhein is, is geregtig om aan te neem dat dit doeltreffend omhein is in soverre dit deur 'n redelike versigtige man gedoen sou word. . . . Na my oordeel dus was die toesig oor hierdie draadheining ondoeltreffend gewees en was die amptenare van die eerste verweerder toegereken word. . . . Dit kom my voor as 'n voorsienbare duidelike risiko wat geloop word deur die persoon wat nalatig sy heining verwaarloos.'

See also *Rawlinson v. Buys*, 1952 (4) S.A. 109 (N), and section 125 of the Provincial Ordinances. The decision in *Coreejes v. Carnarvon Munisipaliteit* has been criticized by Luntz in (1964) 81 S.A.L.J. 294 at 298, but is supported by Boberg in *Annual Survey*, 1964, p. 177.

In *Botes v. Van Deventer*, 1966 (3) S.A. 182 (A.D.), it appeared that, owing to a deviation of the road a certain portion of plaintiff's paddock had remained unfenced with the result that his horses strayed and, at night-time, collided with the defendant's vehicle. Here it was held that the plaintiff had not been negligent in failing to fence off the paddock for a temporary purpose (owing to the said temporary deviation) and, consequently, he was entitled to succeed in his action. No mention was made in the judgments of the judges as to the duties of the animal owner, or of his criminal responsibility, for leaving or allowing his animals to be in a place whence they might stray on to a public road, probably because the road was not, in fact, fenced in on both sides, which is a condition precedent to liability.

(d) CONCLUSIONS

From the aforementioned decisions and considerations it would seem possible to formulate the following rules as the law presently stands:

- (a) On **unfenced lands** in cattle country the onus is upon the injured or damaged traveller seeking redress to establish that the owner of the animal, concerned in a collision, was negligent in some specific manner in failing to take reasonable care in seeing that road-users are not exposed to dangers. Otherwise the traveller virtually proceeds at his own risk but, when sued for damages, he may set up the defence of the invisibility of the animals just prior to the collision.
- (b) That both parties should realize that the behaviour of animals is **unpredictable** and should make due allowances therefore, and in this regard the Apportionment of Damages Act will be of application.
- (c) Where animals are **straying** unattended on roads, **fenced** on both sides, a **presumption** arises that the owner thereof has left them, or allowed them to be, on the public road until the contrary is proved; this is in itself *prima facie* negligence. The owner is, however, **exempt** from liability if he is able to show, upon a preponderance of probability, that the animals concerned were on the road without his knowledge or consent or that he has taken reasonable precautions against any possible foreseeable danger. At **night-time** the herds should be equipped with adequate warning lights as prescribed in daylight with red flags.
- (d) In civil suits the question of the **expense** to the owner of the animals to fence off his animals should be investigated, for his liability would depend upon certain variables depending upon the greatness of the possibility of serious damage, entailing a greater expectation that he should guard against it, as compared with the anticipation of less serious damage, or less likelihood thereof, and the expense of taking adequate precautions to avoid possible foreseeable danger.
- (e) A landowner, or occupier, who **erects a fence** or contributes to the cost thereof to prevent his animals from straying may be found guilty of *culpa* if he negligently fails to **maintain** that fence in such good repair as would prevent his animals from straying on to a public highway.
- (f) The owner of a **gate** in fenced-off land should take reasonable precautions to see that it is closed in order to prevent his animals straying but he may be excused from liability if it appears that he was reasonably unable to prevent trespassers from leaving such gate open.
- (g) A breach of the provisions of a provincial Ordinance (statutory *culpa*) would give rise to a *prima facie* case of negligence but all the pertinent facts should be considered before a final decision in this regard may be made as to the guilt of the owner of the animal concerned.
- (h) Both the master of the driver of the vehicle concerned and also the owner of the animal involved in the collision are liable for the **admissions of their servants**, relating to the latters' negligence regarding the collision, although it is still open to the party, against whom such admissions are proffered, to show that he is not bound thereby (*Botes v. Van Deventer*, 1966 (3) S.A. 182 (A.D.)).

CHAPTER IX

CARRIERS, AIRCRAFT AND SHIPPING AND BOATS

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1. CARRIERS

(1) CONTRACT OR DELICT

As was observed *ante*, p. 22, in certain types of contract the contractual duty to exercise care coincides with the general delictual duty not to injure. A typical case is the contract of carriage. A man who undertakes by contract to carry either the person or goods of another, owes him the contractual duty to take due care. The same duty, looked at from another aspect, exists apart from the contract, which merely provides the occasion for its exercise, since, having the goods or person of another under his control, he owes the general duty not to injure them. See *Lewys v. Burnett and Dunbar* [1945] 2 All E.R. 555.

In such cases, an action founded upon the breach of the duty can be framed either in contract or in delict, unless it is necessary for the plaintiff to rely upon the particular terms of the contract between the parties. In practice, actions for damage to **goods** are normally framed in **contract**, since in the carriage of goods there are usually a number of special stipulations, e.g. when they are carried at 'owner's risk' (*Bischoff Embroidery, S.A. (Pty.) Ltd. v. S.A.R. & H.*, 1966 (4) S.A. 385 (W)—where liability for *culpa* is replaced by a liability for 'wilful misconduct' only). Furthermore, many carriers are 'common carriers' of goods, though not of passengers, and as such are subject to special liabilities. But actions for **personal injury** are normally framed in **delict**, though they need not be, as is shown by *Durham v. C.T. & W. Railway*, 1869 Buch. 302. It seems improbable that a plaintiff will improve his position by suing in contract, either from the point of view of onus (see *Lee v. Reynolds*, 1928 E.D.L. 367, and cf. the General Chapter, l.c.) or from the point of view of damages (*ibid.*). Actions by dependants must be framed in delict (*Jameson's Minors v. C.S.A.R.*, 1908 T.S. at 585).

2. PRAETOR'S EDICT

The position of the consignor vis-à-vis the common carrier presented considerable difficulties in the earliest stages of our jurisprudence for the plaintiff, having to sue either on a contract of *depositum* or *locatio operis*, had necessarily to establish negligence on the part of the carrier. Owing to the notorious unscrupulousness of public carriers in those days, who found it easy to act in collusion with thieves and robbers to be deprived of the goods they were carrying and then claim immunity from any allegation of *culpa* (see Dig. 4.9.1.1 and 4.9.3.1), the Praetor imposed an **absolute liability** on the professional carrier to deliver the goods up to the consignee subject only to the defences of *vis major* and *damnum fatale*. This liability was fundamentally based on quasi-delict (*Institutes* 4.5.3). This Edict is definitely a part of our modern Roman-Dutch law (*Taylor v. Munnik*, 3 Searle 187; *Crocker v. Doig & Murray*, 1 N.L.R. 117; *Stretton v. Union-Castle Co.*, 1 E.D.C. 335, and *Davis v. Lockstone*, 1921 A.D. 153).

Originally the obligation was imposed on the water-carrier (the *exercitor navis*), but it undoubtedly applies to common carriers on land today (*Tregidga v. Sivewright N.O.*, 14 S.C. at 81–2; *Stephen, Fraser & Co. v. P.E. Harbour Board*, 17 S.C. 231, and Dönges, *Carriage of Goods*, p. 84).

The public or common carrier is one who holds himself out to the public as being ready for reward to transport from place to place the goods of anyone wishing to employ him and willing to pay his charges (Wille, *Principles of South African Law*, 5th ed., p. 429).

(a) BASIS OF LIABILITY

The basis of liability is the assumption of *culpa* on the part of the carrier (*Stephen, Fraser & Co. v. P.E. Harbour Board*, 17 S.C. 231; *Van der Merwe v. Colonial Govt.*, 15 C.T.R. 456; *Fumba v. Dickerson*, 22 S.C. 542; *Magaga v. Cole*, 25 S.C. 434; *Herman v. N.S.A.R. Co.*, 4 O.R. 241, and *Postmaster-General v. Van Niekerk*, 1918 C.P.D. 378), consequently there is no necessity for the plaintiff to prove any negligence on the part of the defendant in order to establish his liability (*Davis v. Lockstone*, 1921 A.D. at 159). The obligation is, moreover, to be **actively careful**—*culpa in non faciendo*—so that there is an absolute obligation (subject to specified exceptions) to prevent theft or damage by third parties and to restore safely the goods carried.

The carrier owes a duty to provide both a safe and proper vehicle, and a competent driver (for whose negligence he will usually be liable). He is however, **not an insurer** (*Durham v. C.T. & W. Rly.* (*supra*) and Dönges, pp. 14 and 15.) He is bound only to take reasonable precautions. For liability in contract see *Tomlinson v. Railways Executive* [1953] 1 All E.R. 1 (C.A.);

(b) DEFENCES

As indicated above, the defence of *vis major* or *damnum fatale* may be set up as a defence. These would include shipwreck, attack by pirates, intervention of natural causes, or an act of law (*Benoni Produce Co. v. S.A.R.*, 1914 W.L.D. 31). In this regard it would seem that there must be present elements of (a) unavailability, (b) unexpectedness, and (c) irresistibility (Dönges, pp. 45–6).

The common carrier may also establish—

- (a) the negligence of the consignor (such as bad or incompetent packing) (*Colonial Govt. v. Nathan Bros.*, 13 N.L.R. 100; *C.S.A.R. v. Adlington* 1906 T.S. 964; *Glover v. Finch*, 1921 C.P.D. 358; *Koenig v. Godbold*, 1923 C.P.D. 526); or
- (b) a vice inherent in the nature of the goods consigned, as where a beast was trampled upon by the other cattle consigned in the same truck (*Tregidga v. Sivewright*, 14 S.C. 76);
- (c) *vis major*.

Even if the carrier successfully raises the defence of *casus fortuitus* the consignor can still succeed in his action by establishing *culpa* on the carrier's part in—

- (a) not foreseeing the accident, or
- (b) not avoiding its results, or
- (c) knowingly exposing the goods to a risk.

There is authority for saying that even if the carrier has exercised the very highest diligence he will still be liable unless he can bring the cause

or loss within the above-named exceptions (*Muter's Exors. v. Jones*, 3 Searle 356; Dönges, pp. 127–34, and Solomon J.A. in *Davis v. Lockstone* (*supra*) at 159–60). See also Dönges, *Liability for Safe Carriage of Goods*, and Conradie, *Carriage of Goods*, p. 19.

(c) STATUTORY MODIFICATIONS

There exists today certain statutory modifications of the Edict in relation to (a) shipping—see the S.A. Mercantile Shipping Act, No. 57 of 1951—and (b) railways—Act No. 22 of 1916, section 18(1). The latter enactment stipulates that the Administration shall be liable for damages except in the case of—

- (a) an inherent vice or defect or weakness or some action of the property itself; or
- (b) an act of God, inevitable accident, act of the King's enemies, or inevitable superior force; or
- (c) any act of law.

The far-reaching effect of these provisions is, however, virtually nullified by the terms of the **contract** entered into between the Railway Administration and the consignor; for the Administration (under its regulations—which are part and parcel of the contract) exempts itself from liability, as set forth in the aforementioned section of the Act, by the clause in the regulations specifying that the goods are in all cases carried at the **owner's** risk and that the Administration is not liable for 'loss, damage, shortage, or delay except upon proof by the consignor or consignee that such loss, damage, shortage or delay was occasioned by and through the "wilful misconduct or malfeasance" of the Administration's servants'. (Conradie, *Carriage of Goods*, pp. 18 and 37). A servant who, knowing of the regulations, deliberately fails to comply therewith (e.g. shunting operations) acts 'wilfully' (*Citrus Board v. S.A.R. & H.*, 1957 (1) S.A. 198 (A.D.)). But the words 'wilful misconduct or malfeasance' used in the section are not used to connote conduct of a less serious nature than wilful misconduct and certainly does not connote mere negligence (*Aberdare Cables (Africa) Ltd. v. S.A.R. & H.*, 1959 (2) S.A. 406 (E); *Central S.A. Railways v. Adlington & Co.*, 1906 T.S. 964). Even gross negligence is not to be equated with wilful misconduct (*Groenewald v. Fourie*, 1915 C.P.D. 556, and *Vermeulen v. Heyne*, 1913 A.D. 542). A person wilfully misconducts himself when he knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or fail or omit to do, a particular thing and yet intentionally does, or fails or omits to do it, or persists in the act, failure or omission regardless of consequences. Thus the release by the guard of a train of the vacuum brakes without first ascertaining whether the couplings have been broken, is not 'wilful misconduct or malfeasance'. (See also *Horabin v. British Overseas Airways Corporation* [1952] 2 All E.R. 1016 (Q.B.)) For other cases see *S.A.R. & H. v. Natal Federated Products*, 1949 P.H., A. 25 (N), where it was held that a carrier of goods as a bailee ceases to be liable as such the moment the contract of carriage is completed, also *Partridge v. Buttar*, 1953 (2) S.A. 415 (N); *Bischoff Embroidery, S.A. (Pty.) Ltd. v. S.A.R. & H.*, 1966 (4) S.A. 385 (W)). These regulations are *intra vires* notwithstanding the specific pro-

vision of the parent statute (*S.A.R. & H. v. Conradie*, 1922 A.D. at 137–8) (Dönges, p. 126). Where, however, goods had been discharged from a steamship and had been received by defendant (the Administration), who thereafter issued a delivery order to plaintiff, it was held that, upon its failure to deliver the goods in due course to the plaintiff, as the goods were already in defendant's possession when the contract was entered into, the defendant had forthwith ceased to be a bailee and had assumed the liability of a 'carrier'. Held further, that, as the plaintiff had failed to allege wilful misconduct or malfeasance on the part of the defendant's servants, his plea was bad (*S.A.R. & H. v. Natal Industrial Products, Ltd.*, 1949 (2) S.A. 782 (N)).

3. PASSENGERS

In regard to the liability of a carrier in respect of injuries or damages caused to passengers whilst in transport, however, it is necessary for the plaintiff both to aver and prove *culpa* on the part of the defendant (cf. *Kumalo v. South British Insurance Co., Ltd.*, 1963 (2) S.A. 352 (D)).

(a) WHO IS A PASSENGER ?

Where an omnibus stops at a recognized stopping-place there is an invitation to persons waiting thereat to mount it, consequently a person becomes a passenger from the moment he steps on to the footboard, even if thereafter, owing to the negligence of the conductress (in allowing the bus to move off before he is fully on the bus), he falls off again (*Wilkie v. London Passenger Transport Board* [1946] 1 All E.R. 650).

But where the driver of a vehicle gives a lift to a friend in circumstances being outside the scope of his employment, the master is not liable in damages if the friend is thereafter injured through the negligence of the driver (*S.A.R. & H. v. Marais*, 1950 (4) S.A. 610 (A.D.)).

Furthermore, a passenger, travelling with a **free ticket**, is in the same position as one who has paid (*Jameson's case (supra)*). The fact, therefore, that a second-class passenger is at the moment of the accident in a first-class compartment is irrelevant (*Leonard v. Public Works Commissioner*, 1907 E.D.C. 146); as is the fact that the plaintiff is a child travelling free though over age (*Austin v. G.W.R.*, L.R. 2 Q.B. 442), because the carrier knew of the presence of the party on the vehicle or train.

(b) OMNIBUS DRIVERS' LIABILITY

Liability, and duty to

In regard to omnibus drivers, from the various decisions in regard to their liabilities and duties to passengers mounting and travelling in their buses, it is possible to formulate the following rules and considerations:

- (a) Under modern conditions buses cannot operate at a reasonable speed and in a reasonable manner without passengers being subjected to movements which disturb their balance.
- (b) It is expected of passengers that they will take reasonable precautions to protect themselves by sitting down or, if obliged to stand, to hold on to the handrails or straps provided for the purpose.

- (c) A bus-driver who moves off within a reasonable time after passengers have mounted, and accelerates with reasonable expedition, is not necessarily negligent, even where a person is on the steps of the bus, where the entrance is narrow and is provided with handrails.
- (d) But a bus-driver would, however, owe a special duty to persons who are patently old or infirm to ensure that they are safely mounted on the bus before moving off.
- (e) It is clearly the duty of the driver to avoid sudden and unexpected movements which are not necessary and which may be a source of danger to passengers.
- (f) A sudden stop in an emergency, not of the driver's own making, would excuse him from liability for negligence.
- (g) A bus-driver who undertakes to convey a bus-load of children to and from school should have a door or gate provided to his bus in order to prevent them from alighting while the bus is still in motion.

(*Egging and another v. Law Union & Rock Ins. Co.*, 1958 (3) S.A. 592 (D); *Williams N.O. v. Eagle Star Insurance Co.*, 1961 (2) S.A. 631 (C); *Harvey v. South British Insurance Co., Ltd.*, 1962 (2) S.A. 82 (N); *Kumalo v. South British Insurance Co., Ltd.*, 1963 (2) S.A. 352 (D); *Labuschagne v. Stadsraad van Johannesburg*, 1967 (4) S.A. 99 (W).) (See *post*, p. 184.)

(c) TICKET CASES—CONTRACTING OUT

While the owner company of a ship may protect itself from liability by contracting out therefrom in terms of its tickets issued to passengers, such exemption is not available to the master of a ship in respect of his own negligence (*Adler v. Dickson and another* [1954] 3 All E.R. 397 (C.A.)), since he is not a party to the contract. In this case the plaintiff passenger fell and injured himself while mounting a ship's gangway which moved as he was mounting it, and it was held that the master thereof was liable for his negligence.

A limitation of liability, in a contract of carriage, must however be in plain words, since any ambiguity therein must be construed in favour of the plaintiff if the contract is drawn by the carrier (*Phillipson v. Imperial Airways, Ltd.* [1939] 1 All E.R. 761 (H.L.); *Westminster Bank, Ltd. v. Imperial Airways, Ltd.* [1936] 2 All E.R. 890 (K.B.)). Moreover, a ticket which does not contain the details required by the Warsaw Convention is deficient and, therefore, the limitation of liability to 120,000 francs would not be applicable when the air carrier is sued for damages by plaintiff children for the death of their mother (*Preston and another v. Hunting Air Transport, Ltd.* [1956] 1 All E.R. 443 (Q.B.)). Even though the ticket contract can exclude liability in delict for damages caused to the traveller, such limitation would not bind his dependants (*Grein v. Imperial Airways, Ltd.* [1936] 2 All E.R. 1258 (C.A.) at 1276).

(d) LIABILITY TO TRESPASSER

The question of the liability of a carrier, i.e. of the owner of a vehicle designed to transport or capable of transporting human beings, to a trespasser on the vehicle, is one of some difficulty. In the chapter on Occupation of Land and Buildings, authorities are cited (notably *Farmer*

v. *Robinson G.M. Co.*, 1917 A.D. 501) which establish (a) that the mere fact that the plaintiff was a trespasser will not disentitle him, (b) that a duty of care will be owed to a trespasser when his presence might reasonably have been anticipated, but (c) that where such presence could not reasonably have been anticipated there will be no duty of care and consequently no liability. These principles, being derived from general considerations, should apply equally to the case of vehicles. But difficulty is caused in their application to vehicles by the fact that in many circumstances the presence of persons legitimately in the vehicle may be anticipated (or in fact is known), while the presence of trespassers would not always be expected. In such cases, where a duty is clearly owed to exercise due care in the operation of the vehicle, and is owed to persons in the vehicle, does our law exclude from the scope of the duty those who have no right to be there?

On general principle it would appear that it does not. Because our law, differing from the English law, looks less at the right of the person injured and more at the duty of the owner (*Farmer's* case, especially at 522); and the act of trespass does not, of itself, deprive the wrongdoer of all right to protection (*ibid.*). Moreover, it is not the physical presence of the trespasser which is not anticipated in these cases; it is his quality of a trespasser, which is a very different thing. To say too that a duty to take care exists in respect of persons in a vehicle, but only in respect of those who are rightfully there, smacks of unreality. It is submitted that the true rule is this: **Where the circumstances are such that the presence of persons in the vehicle should be anticipated, a duty is owed to any persons in the vehicle, whether legitimately there or not;** and liability will be incurred (subject to any defences) even to the trespasser, though, in some cases, the duty will be more easily discharged towards the trespasser, because he may be expected to take more care for his own protection (see *Farmer's* case, at 523). But where the circumstances are such that the vehicle would reasonably be thought to be empty, then no duty of care is owed to a trespasser in it.

This suggested rule was supported by the case of *R. v. Matsepe*, 1931 A.D. 150, where the driver of a lorry drove carelessly, and in the resulting collision a boy on the lorry was killed. The driver did not know of his presence, but he knew of the presence of other persons (apparently fellow employees), and there was evidence from which the jury may have concluded that he should have anticipated the possibility of the presence of the deceased. The Court held that the jury was entitled to convict of culpable homicide. The doubts and qualifications expressed by the author in the fourth edition of this work as to the validity of the decision in *R. v. Matsepe* in so far as it can be construed as the application of the *versari in re illicita* principle, now appear to have been justified. See *S. v. Van der Mescht*, 1962 (1) S.A. 521 (A.D.) at 530, where Steyn C.J. disagreed with that decision, saying:

'Hiermee, asook met die bogenoemde decidendi in *Matsepe* se saak d.w.s. met 'n strafregtelike gevolgsaanspreeklikheid, sonder werklike skuldverband tussen die dader en die gevolg wat hom verwyt word, op die grondslag van die leerstuk van *versari in re illicita* vind ek dit, met alle eerbied, nie moontlik om my te vereenselwig nie.'

See also *R. v. Gazembe*, 1965 (4) S.A. 208 (S.R.).

It is submitted, therefore, that the correct position is that if a vehicle driver had no reason to suspect that there were any passengers at all on his vehicle, he would not owe them (including a trespasser) any duty to take care; but if, on the other hand, he knew that there were *some* passengers being conveyed by him, he would certainly be guilty of *culpa* for his negligence in his careless driving, notwithstanding the fact that one of them was a trespasser. In the latter instance the decision in *Matsepe's* case must be correct (cf. *R. v. John*, 1969 (2) S.A. 560 (R.A.D.) at 567). This submission would be in accord with the principles in regard to trespassers generally (see *post*, p. 341, and *Van Tonder v. S.A. Railways*, 1936 O.P.D. 9 at 17). In *S.A.R. v. Metter*, 1921 C.P.D. 190, passengers had apparently all left a train when it was shunted, but plaintiff, unknown to the railway servants, had got in again to look for his gloves; it was held that no duty was owed to him. *Joubert v. S.A.R.*, 1930 T.P.D. 154, is in effect a similar example: here plaintiff was injured when travelling by rail-motor on a section of line which was 'closed' and the Court held that no duty was owed to him because his presence there could not have been anticipated. (See *post*, p. 428.)

Certainly where a person forces himself on to a motor vehicle and is unwillingly carried by the driver, his presence thereon does not amount to a 'conveyance' within the meaning of section 11(1)(b)(iii) of the Motor Vehicle Insurance Act, No. 29 of 1942 (*Netherlands Insurance Co. of S.A., Ltd. v. Van der Vyver*, 1968 (1) S.A. 412 (A.D.) at 425).

Illustrative cases

Trains

Negligence in construction or maintenance of the permanent way is a ground of liability (*Durham's* case, 1869 Buch. 302; *Jameson's* case, 1908 T.S. 575; *Leonard's* case, 1907 E.D.C. 146). In *Bellstedt's* case, 1936 C.P.D. 399, action was based on the starting of a train with a carriage-door open, which it was contended constituted an 'inducement' to the plaintiff, a boy of 8, to attempt to climb aboard; but the Court found that it was no such inducement. In *Young v. Colonial Govt.*, 19 S.C. 455, a train overran a platform at night, and plaintiff descended and was injured: a jury awarded damages. On this question of 'invitation to alight', see the cases brought up in the *English and Empire Digest*, vol. 36, p. 82.

Plaintiff, after being shown into a through coach to her destination, was left behind at a junction and was obliged to proceed on later in a goods train which caused her to arrive at Queenstown five hours later. She had been obliged to spend 3s. extra owing to the oversight. Held, that she was entitled to damages of £5 (*Commissioner for Public Works v. Dreyer*, 1910 E.D.L. 325).

The plaintiff had goods consigned to him at a railway siding where there was no one to receive them. He was not informed nor was aware of the dispatch of the goods. Regulation 14 provides that goods consigned to a railway siding shall only be accepted at the owner's risk. The goods were lost in transit. Held, that the onus was on the Administration of disproving negligence and that this not having been discharged, it was liable for the loss of the goods (*S.A.R. v. Cobern*, 1921 C.P.D. 384).

Where luggage was delivered to a railway porter with instructions to place same in the compartment of a train and where he, in order to ascertain the number of the compartment, left the luggage temporarily in a spot whence it was subsequently stolen, it was held, in an action founded on delict, that he was liable for the loss to the traveller concerned (*De Meyer v. Jackson*, 1942 C.P.D. 42).

Goods were sent at 'owner's risk' and it was found that plaintiff had been advised of their arrival and also informed that the offices were closed until Monday when he would be able to remove them. In the meantime the goods were destroyed on the Sunday by

fire made by a Bantu servant of the Administration and contrary to orders. Held, that the plaintiff's loss was not occasioned by the 'wilful misconduct of the Administration's servants (*Bischoff Embroidery, S.A. (Pty.) Ltd. v. S.A.R. & H.*, 1966 (4) S.A. 385 (W)).

Trams and Omnibuses

In *Johannesburg City Council v. Venter*, 1936 T.P.D. 287, it was held not to be negligence to allow a child to stand on the front platform of a tram, the gates being closed. In *Golden Arrow Bus Service v. Smith*, 1937 C.P.D., Sept., a passenger, who fell when a bus was started before she was safely on board, recovered damages.

A passenger on a tram must be presumed to know how the vehicle he is using is operated and must take ordinary precautions against occurrences which may reasonably be anticipated by him. Where, however, a passenger left her seat while the car was approaching a stopping-place, and walked along the gangway towards the back platform, and, while failing to hold on to anything for the last three paces, fell and injured herself, the Court held that, since the brake had been applied with unusual and improper suddenness, she was entitled to succeed in her action for damages (*Rossouw v. Johannesburg C.C.* (1939) 56 S.A.L.J. 537 and 1939 (2) P.H., H. 27 (T)).

An instructive article on the subject of the liability of the carrier for damages sustained to a passenger by reason of a sudden stopping of the vehicle in which the latter is travelling appears in (1946) S.A.L.J. 63 525, which shows that the American decisions are consonant with *Rossouw's* case.

Plaintiff, while on top of an omnibus proceeding along a country road was injured by broken glass caused by the bus brushing against branches of a tree. The accident took place at midday and the tree was perfectly visible to the driver. Held, the defendant company was liable in damages (*Radley v. London Passenger Transport Board* [1942] 1 All E.R. 433).

The deceased, a passenger in an omnibus, had been standing in the bus where there were no vacant seats when because the driver took a curve at too great a speed, he was thrown through the door of the bus which had not been closed. At the time the passenger had not been holding on to any bar or strap since none had been provided for passengers. Held, that the driver was negligent and there was no contributory negligence on the part of the deceased (*Western Scottish Motor Traction Co. v. Fernie* [1943] 2 All E.R. 743).

The plaintiff, while travelling in an omnibus of defendant had, through her husband, intimated her desire to get off at the next stopping-place and had been told by the conductor, who rang the bell at their request, to wait until the bus stopped. The bus did stop, not at the proper stopping-place but some 20 yards short thereof owing to road works and traffic conditions as the driver was waiting for an oncoming vehicle to pass. The husband alighted, but as the plaintiff was alighting the bus moved on and she was thrown to the ground and injured. Held, that as the conductor took no steps to warn the plaintiff that the stop had not been reached, he had been negligent and that the defendants were liable in damages (*Prescott v. Lancashire United Transport Co.* [1953] 1 All E.R. 288 (C.A.)). The basis of this decision is that the conductor, having invited plaintiff to alight when the bus stopped, ought to have known that the bus was not stopping at the proper stopping-place and ought to have warned the passengers not to alight.

A bus-driver, before moving off from a bus stop, is required to look into his left-hand mirror for persons mounting his bus, and to have his mirror so adjusted that it gives him a view of the rear platform of the bus and the immediate approaches thereto. But once he has looked and received the signal from the conductor to the effect that he can proceed, he is thereafter obliged to turn his attention to the traffic ahead of him and on the right, into the stream of traffic which he is about to enter. If, after he has turned his attention in that direction, someone should start to mount the bus, a failure on the part of the driver to see him will not constitute negligence (*R. v. Needham*, 1957 (1) S.A. 283 (C)).

4. AIRCRAFT

(a) AVIATION ACT

The delictual liability in respect of aviation activities is largely governed by statute, namely by the Air Act, No. 17 of 1946, and the Aviation Act, No. 74 of 1962, as amended, together with a number of Government Notices commencing with No. 74 of 24th August, 1962 (references to

which are set forth in the Statutes of the Republic under 'Aviation'), the rules and regulations of which would, it is submitted, form a guide as to what is, and what is not, negligence in any given circumstances. The matter of the licensing and insurance of aircraft is dealt with by the Air Services Act, No. 51 of 1949, as amended. This Act applies to all aircraft while in or over any part of the Republic but is made inapplicable to the Defence Force personnel and aerodromes.

Act No. 17 of 1946, as amended by Act No. 5 of 1964, stipulates that not more than one action may be brought in respect of any single claim for damages and, in applying the Warsaw Convention, incorporates a Schedule or Articles, the more pertinent of which are Articles 17 to 19, which impose an absolute liability upon the carrier for all damage sustained for death or injury to passengers, or for loss or destruction of goods, or for damages occasioned by delay on board the aircraft or in the course of the operations of embarking or disembarking, but with the defence available in Article 20, which reads:

Section 11(2) of Act 74 of 1962 provides:

'(1) The carrier is not liable if he proves that he and his agent have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

'(2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by the negligent pilotage or negligence in the handling of the aircraft or in the navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.'

The said Schedule to the Act also makes provision for the death or wounding of a passenger (section 17), the loss of, or damage to, registered luggage (section 18), while the court may exonerate the carrier if damage was caused or contributed to by the negligence of the injured person (section 21). Section 22 limits the amount of damages claimable to 125,000 francs for each passenger and to 250 francs per kilogram in respect of luggage unless the value has been declared and a supplementary sum is paid therefor. Section 25 stipulates that the above-mentioned limits do not apply where damage is caused by 'wilful misconduct'. Section 26 provides that, in the case of damage, the plaintiff must complain forthwith within three days from the date of the receipt of his luggage and within seven days in the case of failure to deliver goods. The prescriptive period is two years

As to what is 'wilful misconduct' in relation to the taking of adequate precautions see *Horabin v. British Overseas Airways Corporation* [1952] 2 All E.R. 1016 (Q.B.) where it was held that the words mean misconduct which is the will of the party and arises when the person concerned appreciates that he is acting wrongfully (or is wrongfully omitting to act) and yet persists in so acting (or omitting to act) regardless of the consequences and with reckless indifference to what the results may be.

Section 11(2) of Act 74 of 1962 also provides:

'When any material damage or loss is caused by an aircraft in flight, taking off or landing, or by any person in such aircraft or by any article falling from any such aircraft, to any person or property on land or water, damages may be recovered from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action as though such damage or loss had been caused by his wilful act, neglect or default.'

Subsection (3) however provides that this aforementioned section does not apply where damage or loss was caused, or contributed to, by the negligence or wilful act of the person by whom it was suffered.

Exclusion of liability

(a) *By statute.* Section 20 of Act No. 74 of 1962 exempts the State and its officers and employees from liability, when acting in the performance of their duty, in respect of damage, loss, death or injury to any person conveyed on state aircraft.

(b) *By contract.* It has been observed (*ante*, p. 181) that liability may be excluded by contract provided the passenger can fairly be said to have agreed thereto. In this regard the decision in *Fosbroke Hobbes v. Airwork, Ltd.* [1937] 1 K.B. 108 is in point. Here it was held that, in regard to private planes, where a plane had been hired by correspondence and subsequently, just before the take-off, an envelope containing a 'ticket' exempting the defendant from liability was handed to the hirer before he had had time or opportunity for seeing and examining the contents of the envelope, the hirer was not bound by any such alleged contract of exemption. Accordingly, the defendant was liable in damages to the hirer's dependant as a consequence of the pilot's negligence.

(c) *Contributory negligence.* See section 11(3) of Act No. 74 of 1962, above.

Where carriage by air has been undertaken by successive carriers and there is no mention of negligence in the consignment note, the only court which has jurisdiction is the one at the residence of the carrier (*Rotterdamse Bank v. B.O.A.C.* [1953] 1 All E.R. 675).

For a discussion on the Carriage by Air Act see (1947) 64 *S.A.L.J.* 236.

(b) INTERNATIONAL CONVENTIONS AND AGREEMENTS

In order to secure some degree of uniformity and unanimity in regard, *inter alia*, to liability for loss during carriage in regard to inter-state transport a number of conventions have been concluded between various states, for example the Warsaw Convention of 1929 which was promulgated as the Schedule to Act No. 17 of 1946 and brought into force by Proclamation No. 69 of 1955. This convention, it should be noted, is binding on the 'high contracting parties', i.e. the signatory states, whether or not they have ratified it (*Phillipson v. Imperial Airways, Ltd.* [1939] 1 All E.R. 761 (H.L.) and cf. *Westminster Bank v. Imperial Airways, Ltd.* [1936] 2 All E.R. 890 (K.B.)). There is also the Universal Convention of Ottawa, 1957 (see section 2 of Act No. 44 of 1958, which has not yet been promulgated). These were considered in *Pan American Airways Inc. v. S.A. Fire Accident Insurance Co., Ltd.*, 1965 (3) S.A. 150 (A.D.), where respondent, as cessionary of a diamond merchant, sued appellant for damages in delict, in an amount of R12,138, for non-delivery of a registered parcel of diamonds contained in a mail-bag received by the appellant at the Jan Smuts Airport for delivery to the Merchants Bank of New York, the main allegation being the negligence of the appellant through its agents or servants. The respondent had taken exception to the defendant's plea in the local division, denying negligence and also raising three alternative defences,

namely (a) that in terms of the Universal Postal Convention of 1957 its liability was limited to 25 French francs (viz. R10), the contention being that, in terms of the convention and of a Bilateral Air Transport Agreement of 1947, the appellant had the same rights as the United States Postal Administration would have had had it been a carrier; (b) that in terms of the Bilateral Agreement, read with the convention, the duties of an air carrier were governed by the laws of the United States in terms of which the appellant was not liable to the owner or sender of registered articles, and (c) alternatively, that the Warsaw Convention, as applied by Act No. 17 of 1946, stipulated that any right of action in respect of a lost article was limited to the consignor or consignee thereof, that the consignor of the parcel was the S.A. Postal Administration and the consignee was the United States Postal Administration and that, accordingly, the respondent had no claim in respect of its loss. The Appeal Court held, however, that as the plea failed to disclose the essential facts, it disclosed no defence, and that the defendant's appeal should be dismissed with costs.

For exemptions and limitation of liability, see *ante*, p. 186.

(c) PUPIL PILOT—LOW FLYING

It is not every degree of want of skill which will render a pupil pilot, to whom his trainer entrusts his aeroplane, liable to the trainer for damages for its destruction caused by a crash. The test of negligence, which will found an action, must necessarily be different from that applicable when an owner of a machine lends it to a person who professes to be competent to drive. The trainer must prove that the pupil failed to exercise such care, or employ such degree of skill, as might reasonably be expected of a pupil with the experience of the pupil and with the training which the trainer has given him (*African Flying Services v. Gildenhuys*, 1941 A.D. 230). In this case the plaintiff succeeded in establishing his case of negligence against the defendant for flying unnecessarily low. Per Tindall J.A.:

'The test of negligence which will found an action in such a case must necessarily be different from that of an owner of a machine who lends it to a person who professes to be competent to drive. The trainer must prove that the pupil failed to exercise such care or employ such degree of skill as might reasonably be expected of a pupil with the experience of the pupil and with the training which the trainer has given him. . . .

'Now low flying, though it is dangerous, is not in itself negligence . . . if the aeroplane is flown high enough to avoid land obstacles low flying does not give rise to danger as long as the machine maintains speed. The danger in low flying arises if the engine stalls, for then the pilot has insufficient height for recovering from an incipient spin.'

As to what constitutes 'low flying' see *R. v. Louw*, 1948 (1) S.A. 1054 (T).

(d) ACROBATICS

Where, owing to the indulgence of the pilot in acrobatics, a defect was caused in the aeroplane he was piloting making it necessary for him to land on a road, and he landed without troubling to see that the road was clear, the Court decided that he was guilty of culpable homicide for the death of a Native cyclist who was riding on the road in question (*R. v. Sturgeon* (1941) 56 S.A.L.J. 298). It is, of course, a criminal offence to fly an aircraft in a dangerous manner (*R. v. Pohl*, 1939 E.D.L. 5).

The pilot is presumed to know the regulations and must comply with them. The State need not therefore establish *mens rea* on his part, nor does the maxim *lex non cogit ad impossibilia* apply in the case of dually controlled aircraft with unapproved modifications, and where the pilot makes no application for modification prior to taking up passengers (*R. v. Adcock*, 1948 P.H., K. 58, 1948 (2) S.A. 818 (C)).

5. SHIPPING

It is not proposed to deal extensively in this work with the legal position in all its aspects in regard to delictual liability of persons concerned with shipping. A few fundamental principles and some of the leading South African cases should, however, be noticed. The practitioner who seeks more detailed information in this regard should refer to Carver's *Carriage by Sea*, Abbott's *Law of Merchant Ships*, Marsden's *Collisions at Sea*, Kenny's *Law of Civil Salvage*, the *English and Empire Digest*, vol. 41, Halsbury (35), pp. 687-702, and the South African Merchant Shipping Act, No. 57 of 1951.

(1) COLLISIONS

The basis of liability for collisions at sea is *culpa*, for in every case it will be necessary to establish negligence on the part of the owners or persons in charge of the ship. The only exception, in English law (originally introduced by 57 & 58 Vict., c. 60, sec. 419, 4, and see Marsden, p. 46), to this rule is one which stipulates that, where it can be shown that statutory regulations have been infringed and that such infringement might possibly have contributed to the collision, liability will be incurred. Upon the submission of such proof damages may be recovered without proof of negligence. (See also Halsbury (35), pp. 702-18.)

(a) *Right of way*

Article 25 of the Sea Regulations stipulates that in narrow channels every steam vessel shall, when it is safe and practicable, keep to the side of the fairway which lies to the starboard side. The same rule obtaining in respect of a motorist travelling on the wrong side of the road is applicable to shipping in this regard (*Springbok Boating Co. v. S.A.R. & H.*, 1945 A.D. at 121). It follows that it is only when the person on his correct side of the road becomes aware that the other person is unable or unwilling to give way that he must take all reasonable steps to avoid an accident (*ibid.*). In this case it was held that the ship on the wrong side of the fairway was responsible for the collision, and furthermore that the ship on the correct side was not obliged to go outside the line of fairway marked by the buoys when, in so doing, she might run the risk of grounding, unless, of course, it can be proved that the navigator knew that it was safe to do so. (See also Marsden, p. 39.)

It is the duty of an overtaking ship, or one seeking to cross the course of another, to keep out of the way of the ship which is being approached (*Rennie & Sons v. Minister of Railways* (1913) 34 N.L.R. 396.)

(b) *Compulsory pilotage*

The owners of a ship are not liable for damage occasioned through collision during compulsory pilotage while entering the port owing exclu-

sively to the *culpa* of the pilot (*Weir v. Union S.S. Co.*, 1874 N.L.R. 61; *Table Bay Harbour Board v. City Line, Ltd.*, 22 S.C. 511; Beven, *Negligence*, pp. 1253-4).

The pilot is, of course, responsible for his own negligence (*R. v. Judge of City of London* [1892] 1 Q.B. 273), but the master owes him a duty to disclose all particulars of the ship affecting its efficiency, otherwise the master will be liable.

In this regard section 43 of Act No. 70 of 1957 provides that:

'The East London Harbour . . . and the Durban Harbour are hereby declared to be compulsory pilotage harbours. . . . Provided that the Administration and the pilot who is a servant thereof shall be exempt from liability for any loss or damage that may arise or be caused through the act, omission or default of such pilot.'

The last three words are of importance, as was illustrated in the decision in *Shell Tankers, Ltd. v. S.A.R. & H.*, 1967 (2) S.A. 666 (E). Here the defendant was sued for damage done (by a shallow patch which projected above a depth of 30 feet from the bottom of the harbour) to the bow and keel plates of a tanker while docking under compulsory pilotage and being pushed broadside on to the wharf by two tugs. The said patch was not marked with a buoy, nor was it marked on the charts of the harbour by the Port Captain, whose duty it was to keep the charts of the harbour up to date, with the consequence that the pilot was unaware of its presence. The Port Captain had been notified by plaintiff's agents that tankers not exceeding 590 feet in length and with a draft of not more than 30 feet fore and 32 feet aft would be acceptable for berthing and had been informed that the ship's maximum draft was 29 feet forward and 29 feet 6 in. aft. Here it was held that, although the pilot was exempted from liability, in terms of the above-cited provision, yet the defendant had, through its servants also been negligent and as joint tortfeasors could not escape liability for the damage caused. It appeared, moreover that three other vessels had previously fouled this submerged patch of ground. (See also (1967) 84 *S.A.L.J.* 394.)

(2) SAFE SHIPS AND CARE

The owner of a fishing fleet has not only a moral but also a legal duty to provide adequate means of propulsion or suitable means of rescuing the crew of a drifting boat, or both (*Silva's Fishing Corporation (Pty.) Ltd. v. Maweza*, 1957 (2) S.A. 256 (A.D.)). In other words the obligation on the owner is to provide reasonably safe ships. In this case the engine of the fishing-boat failed and the vessel had drifted for nine days until it was wrecked in a storm when the plaintiff's husband was drowned, and it was also found that the owner was also negligent in failing to take any reasonable or adequate steps to rescue the crew when, by the use of ordinary diligence, he could have done so by making use of the rescue facilities available.

Similarly where, owing to the negligent management of one ship, another ship is damaged, forcing the crew thereof to take to sea in a life-boat which subsequently capsizes causing the passengers thereof to lose their lives, the chain of causation is not broken and the owner of the first ship can be liable to the dependants of the drowned men (*The Oropesa* [1943] 1 All E.R. 211 (C.A.)).

In *Adler v. Dickson and another* [1954] 3 All E.R. 397 (C.A.), while the plaintiff was ascending the gangway of a berthed ship, it moved, with the result that he fell on to the wharf, suffering severe injuries, and here it was decided that the master and the boatswain of the ship were liable in damages for their negligence.

Open and unguarded Hatches

It is the duty of the owners through its servants to see that the hatches, when left open, are fenced off by guard rails, consequently where a deck-hand or dock-hand falls down an open and unguarded hatch he can successfully obtain damages (*Morris v. West Hartlepool Steam Navigation Co., Ltd.* [1956] 1 All E.R. 385 (H.L.)). See, also, *Grant v. Sun Shipping Co., Ltd.* [1948] 2 All E.R. 238 (H.L.) and *Wilkinson v. Rea, Ltd.* [1941] 2 All E.R. 50 (C.A.)). These decisions should be compared with that in *Hobson v. Bartram & Sons* [1950] 1 All E.R. 412 (C.A.), where it was held that the manager of a ship, out on a trial run under the Argentinian crew over whom he had no control, was not liable for the plaintiff's falling down a hatchway left uncovered.

(3) APPORTIONMENT OF DAMAGES

In terms of section 255 of Act No. 57 of 1951, liability to make good the damage or loss occasioned is in the proportion to the degree in which each ship was at fault. This section, however, expressly excludes liability under contract.

(4) HARBOURS

(a) *Lights*

The controller of a harbour (e.g. the S.A.R. & H.) is entitled to expect that a mariner, upon entering a harbour, will navigate his ship with reasonable care and in the ordinary and customary manner (*In re S.S. Winton*, 1938 C.P.D. 247), but if the harbour authorities introduce a source of danger in a harbour under their control, then they are under a duty to see that no one is injured thereby. Whether a **light** constitutes a danger by reason of the fact that it might be confused with other lights in the vicinity depends upon the circumstances in each case when a ship enters the harbour, regard being had as to whether the mariner concerned had notice of the existence of the different lights (*ibid.*). In this case it was found that the stranding was due solely to the negligent manner in which the ship was handled.

(b) *Removal of wrecks*

The power given under section 3(v) of Act 22 of 1916 to the Administration to remove and destroy any stranded or sunken wreck and to recover the expense thereof from the owner of the ship, applies to the person who is the owner at the time when the removal took place and not to the owner at the time when the ship sank (*Osaka Mercantile Steamship Co. v. S.A.R. & H.*, 1938 A.D. 146).

(c) *Pilots*

The master of a vessel entering a harbour under the compulsory supervision of a pilot, and who has no knowledge of the local traffic signals, is not liable for the negligence of the pilot (*The Hans Hoth* [1953] 1 All E.R. 218).

(5) INJURY TO PERSONS

The owner of a shipping fleet has not only a moral but also a legal duty to provide adequate alternative means of propulsion or suitable means of rescuing the crew of a drifting boat or both (*Silva's Fishing Corporation v. Maweza*, 1957 (2) S.A. 256 (A.D.)).

In this case the defendant excepted to the declaration on the ground that no liability arises in delict from mere omission but the Court held that, in entering upon a fishing venture, the owner was entering upon a potentially noxious activity and, having done so, he was under a duty (a) to provide alternative propulsion should one means fail and (b) to take steps to have the crew rescued when it was reported to him by other boats that his boat was drifting, and that he was liable in damages to the widow of one of the crew who lost his life when the boat was wrecked.

When a vessel was on the high seas and some portion of the machinery fell and injured the plaintiff, a marine engineer, during the performance of his duties it was held that, in view of the fact that the defendant's notice had been drawn to the fact that the engines of the ship thumped in a loud and unusual manner and as it had taken no steps to remedy the defect, he was entitled to damages (*Evans v. Bucknall Steamship Lines, Ltd.* (1907) 24 S.C. 58).

Where loss of life or personal injuries are suffered by persons on board a ship owing to fault of that ship and another ship, the liability of the owners shall be joint and several (section 256 of Act No. 57 of 1951).

Where a boatman on board a lighter lying alongside a steamer, from which it was receiving cargo, was injured by a falling basket, it was ruled that he was liable for contributory negligence in crossing the deck when he knew the basket might be coming down and in failing to keep a proper look-out (*Weddovitch v. Donald Currie & Co.*, 6 E.D.C. 177).

Where, however, no contributory negligence in such similar circumstances can be established, the owners of the discharging vessel will be liable in damages (*Lord v. Union S.S. Co.*, 6 E.D.C. 141, and *Kay v. Union-Castle Co.*, 15 E.D.C. 26).

(6) GOODS DAMAGED OR LOST

As indicated *supra* (p. 179), the delictual liability for safe carriage may be altered by contract for a shipmaster will be liable for damages resulting to cargo through negligence unless he specifically excludes liability for such in his bill of lading (*Clan Line v. Alcock & Co.*, 13 S.C. 104). Where, therefore, a bill of lading exempted shipowners from liability 'for loss occasioned by robbers and thieves by land or sea whether in the service of the shipowners or not', it was held that the shipowners were not liable for any kind of theft committed by anybody, except the shipowners themselves (*Thomson, Watson & Co. v. Poverty Bay Farmers Meat Co., Ltd.*, 1924 C.P.D. 380).

The amount of damage claimable where there is no fault on the owner's part is fixed in proportion to the tonnage of the ship (section 261 of Act No. 57 of 1951).

The statutory responsibility of the carrier is to exercise due diligence in (a) making the ship seaworthy, (b) in manning, equipping and supplying the ship properly, and to make the holds refrigeration fit and safe for the reception, carriage and preservation of the goods (section 308 of Act No. 57 of 1951). Otherwise liability is excluded (section 309(1), *ibid.*). Section 308(2) gives a number of instances wherein damage may or might be caused but where the burden of proof is cast upon the plaintiff to establish actual fault or neglect by the carrier or his servants or agents.

Section 347 provides that if any damage to person or property arises from non-observance by any ship 'of any of the collision regulations', the damage shall be deemed to have been caused by the wilful default of the person in charge of the deck of the ship at the time, unless it is proved that the circumstances of the case made a departure from the regulations necessary.

Damage by rats is not damage by act of God or dangers or accidents of the seas, and a shipowner is liable for such damage (*Muter's Exors. v. Jones*, 3 Searle 356).

Although a bill exempts a shipowner from liability for rust or damage by vermin he will nevertheless remain liable if such damage could have been avoided by due precautions (*Philip Bros. v. Koop*, 4 S.C. 53). Furthermore a proviso exempting the shipowner from liability for vermin does not cover liability for damage by water owing to rats having gnawed through a leaden pipe (*Poppe v. Glendenning* (1864) I.R. 163). Again, the defendant will still be liable, upon proof of negligence on his part, in allowing goods to rust, notwithstanding the fact that immunity from damage from rust was a condition of the bill (*Krohn v. Nurse*, 1873 Buch. 85), nor will an exemption from liability for breakage exonerate the owner from liability for breakages due to the negligence of his servants (*Union Steamship Co. Ltd. v. Brickhill* (1888) 9 N.L.R. 225).

Apart from special contract, a carrier by sea cannot immediately discharge his liability by landing goods on a quay, and a custom to the contrary would be unreasonable and bad in law (*Parker Wood & Co. v. Bullard King & Co.*, 1876 N.L.R. 18).

(7) DEFECTIVE PACKING

Apart from special contract, where the bill of lading states that the goods have been shipped in good order and condition, the carrier's liability to deliver the goods safely is not destroyed by the goods having been badly packed by the consignor (*Oxford v. Donald Currie & Co.* (1881) 2 N.L.R. 227). On the other hand, where the shipper of cargo had agreed to be responsible for stowage, and stowed some cargo in a damaged condition, it was decided that the master could not be held responsible therefor (*Madsen v. Scott*, 16 S.C. 385).

(8) CHARTERED SHIP

Where a chartered ship had become involved in a collision with another at sea it was held that, since the charterers took possession of the ship and

appointed the captain, officers and crew, that the owners of the ship were not liable for the damage (*Compagnie des Messageries Maritimes v. The Agricultural Co-op. Union*, 1922 N.L.R. 84). See also *States Marine Corporation v. S.A.R. & H.*, 1949 (1) S.A. 963 (C), where it was held that, in the absence of any allegation of negligence, the salvors, in order to succeed, must allege either that the charterer's liability arises absolutely from the terms of the charter or that one of its clauses fixes it with liability.

Unless the conditions of a charter-party relieve the owner, as distinct from his servants and agents, from the consequences of personal negligence, he is liable for damages accruing during the voyage, owing to such cargo having been so laden as to render the ship, in other respects seaworthy, top-heavy at starting (*S.S. Lincoln v. Smith*, 22 N.L.R. 234, and 25 N.L.R. 7; *The Monarch Steamship Co.* case [1949] 1 All E.R. 1).

(9) SALVAGE

Three conditions must be present if salvage money is to be claimed successfully, namely (1) that the vessel is in danger or distress; (2) that the salvors rendered assistance, and (3) that the assistance so rendered resulted in saving the vessel and cargo (*Mossel Bay Boating Co. v. Brinck*, 18 S.C. 271). See also sections 293 to 306 of Act 57 of 1951.

Salvage reward must be proportioned to the risk incurred by the salving vessel as well as to the danger of the vessel rescued from peril (*Randall v. Gray*, 12 S.C. 387). It also depends upon the skill, time and labour expended and the loss and expenses incurred (*Messina Bros. v. Kirsten*, 1912 C.P.D. 127; *The Mangoro* (1913) 34 N.L.R. 60).

Frequently it is difficult to ascertain whether the assistance rendered is that of salvage or **towage**. Where the safety of the vessel and the lives of the crew are in peril the matter will usually be one of salvage (*Georgetta Lawrence v. Calcutta*, 1878 Buch. 102). It follows that the general rule is that where a vessel on the high seas is so disabled as to be unable to proceed without assistance, any assistance rendered is salvage (*J. W. Sauer v. S.S. Sellasia*, 1926 C.P.D. 437), but the officers and crew may be barred from salvage claim where their employer, with full knowledge of the circumstances, has entered into a contract of towage, unless, of course, such contract is manifestly unfair to the salvors (*ibid.*).

As to what is fair remuneration or sufficient tender see *S.A.R. & H. v. Wilcocks N.O.*, 1935 C.P.D. 489; *S.A.R. v. S.S. Muanza*, 1923 E.D.L. 216; *East London Landing & Shipping Co. v. Birmingham*, 2 E.D.C. 394; *Table Bay Harbour Board v. New Zealand Steamship Co.*, 18 S.C. 34; *Mangold Bros. v. Carstensen*, 15 E.D.C. 1; *Randall v. Gray* (*supra*). In *Union-Castle Co. v. Herbst*, 18 S.C. 322, where two vessels functioned in the salvage, the money was apportioned on the basis of two to one.

(10) LIMITATION OF LIABILITY

Section 503 of the Merchant Shipping Act, which limits liability to £8 per ton, does not bind the State (*S.A.R. & H. v. Smith's Coasters*, 1931 A.D. 113).

(11) PRESUMPTIONS

Foundering. Where a vessel founders immediately after proceeding on her voyage, there is a presumption that she was unseaworthy at the commencement of the voyage (*Levy v. Calf and others* (1857) W. 1).

6. BOATS AND HYDROPLANES

The driver of a hydroplane, in approaching a stationary boat, must be aware of the risk of causing injury to swimmers in the vicinity of the boat, to possible skiers, and to the possible fouling of the ropes attached to the boat for the use of skiers. He must also keep a proper look-out for such possible dangers to other people or property (*Robinson v. Roseman*, 1964 (1) S.A. 710 (T) at 715).

CHAPTER X

OCCUPATION OF BUILDINGS AND LAND

SUMMARY

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1. DUTIES TO THOSE COMING UPON PROPERTY

ENGLISH LAW

The duty owed by the occupier of property to those coming upon it was authoritatively restated by the House of Lords in *Addie & Sons v. Dumbreck* [1929] A.C. 358. That duty, in English law, depends upon the right or capacity in which the person comes upon the property. Persons coming upon property fall, under that system of law, into one of three rigid categories: (a) the invitee; (b) the licensee, or (c) the trespasser. There are no intermediate divisions. It is for the court to decide first of all into which category the person falls and, when that has been determined, the duty owed to him by the occupier of the property follows.

(a) The **invitee** is one who comes upon the property for some business in which he and the occupier have a common or joint interest. (A social visit has been held not to come within this description, *sed quaere*.) To such person the occupier owes the active duty to take reasonable care to ensure that the premises are safe (*Addie & Sons v. Dumbreck* (*supra*) at 365, and *Hillen v. I.C.I., Ltd.* [1936] A.C. 65). In the latter case it was ruled that the duty is not limited to those places where the invitee might reasonably be expected to go.

(b) The **licensee** is one who comes upon the property with the express or tacit permission of the occupier. To such person the occupier owes no duty to take active steps to make the premises safe; but he is bound not to create a 'trap', or to allow a concealed danger, not apparent on ordinary inspection, of which he knows or ought to know, to exist without warning to the licensee (*Baker v. Bethnal Green M.C.* [1944] 2 All E.R. 301). His duty here primarily is to *warn*: if the licensee has knowledge of the danger, or if it is apparent on ordinary inspection, he must take the property as he finds it and protect himself. See also (1939) 51 *S.A.L.J.* 477. *London Graving Dock v. Horton* [1951] 1 All E.R. (H.L.): In this case it was decided that the duty owed to an invitee is not so high as that owed to an employee by an employer. Here the workman fell from a staging. He had knowledge that the staging was faulty but judgment was nevertheless given in his favour. A visitor to a tenant is a licensee (*Haseldine v. Daw & Son* [1941] 3 All E.R. 156).

(c) The **trespasser** is one who comes upon the property without the permission, express or implied, of the occupier. To such person the occupier owes no duty whatever, except the duty not to injure him *wilfully* by some act done 'with a deliberate intention to injure, or a reckless disregard of his presence'. The trespasser, whether his presence is known or not, comes upon property at his own risk and no duty of care, or even of warning, is owed to him. See *Walder v. Hammersmith Borough* [1944] 1 All E.R. 490, the facts of which are cited *post*, p. 201; *Burton v. Cotton Research & Ind. Bd.*, 1950 (4) S.A. 34 (S.R.), and *Pitt v. Jackson* [1939] 1 All E.R. 133. For the English law in regard to the setting of *spring guns* for trespassers, see Beven, p. 543. (See also *post*, p. 199.)

SOUTH AFRICAN LAW

Although in many, perhaps in the majority of, cases our law would arrive at the same conclusion as would English law, the standpoint of our

law is fundamentally different, for our law does not follow the technical distinctions made by English law between invitees and licensees (*King v. Arlington Court (Muizenberg) Ltd.*, 1952 (2) S.A. 23 (C) at 27). Liability under our law arises from *culpa* arising from a duty to take care in regard to people coming on to one's property (*Spencer v. Barclays Bank*, 1947 (3) S.A. 230 ((T) at 242) and a larger latitude is allowed in such inquiry than is permitted by the various distinctions postulated in English law (*Cape Town Municipality v. Paine*, 1923 A.D. 207 at 215). In other words, our law looks not so much to the *right* of a person coming on to the property as to the **duty of the occupier** (*Payne's case (supra)*). (See also Milner in (1957) 74 S.A.L.J. 230; *Skinner v. Johannesburg Turf Club*, 1907 T.S. 852 at 859.) Such duty is measured by the general test, namely, the care which in the circumstances would have been observed by the reasonable man (see per Innes C.J. in *Farmer v. Robinson G.M. Co.*, 1917 A.D. at 522-3, and S.A.R. & H. v. *Marais*, 1950 (4) S.A. 618 (A.D.)). In deciding the scope of such duty, the element of **knowledge** actual or imputed. (See *Spencer v. Barclays Bank (supra)* at 239) will be of paramount importance; so will the relationship between the parties (*ibid.*).

Although our law does not recognize the categories of the English law in their rigidly exclusive application, nevertheless they may form a valuable basis for ascertaining what is to be expected of a reasonable man (*Elphick & Rickeberg v. S.A. Railways*, 1920 T.P.D. 316 at 321). It seems to be a fair inference that, had these or similar distinctions been kept in mind in relation to the degree of care required of the defendant, much of the confusion and contradictions in the decisions relating to dogs biting people on premises (see *ante*, pp. 162-4) would have been avoided. It was not until the decision in *O'Callaghan v. Chaplin*, 1927 A.D. 310, that it was recognized that the duty of the dog-owner bore some relationship to the right, or not, of the injured party to be on the premises in question. The well-known concepts in Roman-Dutch law of *culpa lata*, *culpa levis* and *culpa levissime* find no place in our law of delict (save, perhaps for the apportionment of damages) for the test is always that of a *diligens pater-familias* in the particular circumstances (see McKerron, p. 227, and also the 'personal equation', *post*, p. 202).

Where a person comes upon the property of another, there is **no implied warranty** by the occupier that the premises are safe (*Sangster v. Durban Municipality*, 1934 N.P.D. 347; *McLaughlin v. Koenig*, 1928 C.P.D. 102); but the occupier will owe him a **duty to take reasonable precautions to ensure that the property is safe** (*Amalgamated Collieries v. Kloppers*, 1945 O.P.D. 109, and see the same principle applied in *R. v. O'Reilly Builders (Pty.) Ltd.*, 1946 N.P.D. 392). In this case the appellant company were held to have been negligent in allowing unskilled Native labourers to operate an unsafe scaffolding because it should have foreseen that they were likely to operate it in such a way that an accident would occur. See also *Cape Town Municipality v. Paine*, 1923 A.D. 207.

The duty to take reasonably adequate care, therefore, is not a duty to make the property absolutely safe; or to take the best possible precautions, but 'the occupier must take such precautions as will leave no likelihood of harm such as would be foreseen by the reasonably prudent person' (per De Villiers J.P. in *Cecil v. Champions, Ltd.*, 1933 O.P.D. at 34), and he

is entitled to assume that the person coming upon the property will take due care of himself (*ibid.*, and cf. *Hammerstrand's* case, 1913 T.P.D. 374 at 377). It follows that against a *remote possibility of harm*, not amounting to a likelihood, precautions need not be taken (*Manderson v. Century Insurance Co.*, 1951 (1) S.A. 533 (A.D.)). And it further follows that in respect of 'familiar and obvious dangers', which the reasonable man would expect those coming upon the property to realize and avoid, no special duty will be owed (*Glasgow Corporation v. Taylor* [1922] 1 A.C. 44 at 60-1, applied in *Johannesburg Municipality v. Venter*, 1936 T.P.D. 287).

The occupier must, of course, give warning of any **hidden danger** ('traps') of which he **has knowledge** (see *Baker v. Bethnal Green Municipality* [1944] 2 All E.R. 301), and make the property reasonably safe for such persons as may be expected to come on to the property (*Fleming v. Rietfontein Deep G.M. Co.*, 1905 T.S. 111), but not to protect the visitor from any danger which is clear and apparent (*Skinner v. Johannesburg Turf Club*, 1907 T.S. 852; *Prior v. S.A.R.*, 1935 O.P.D. 123). In *Meltzer v. Reserve Investment Co.*, 1915 T.P.D. 526, it was said that 'imputed knowledge is not sufficient'; but the more correct rule is that there is a duty to warn in respect of hidden dangers of which the occupier *should have known* (*Spencer v. Barclays Bank*, 1947 (3) S.A. 230 (T) at 239; *Addie & Sons v. Dumbreck* [1929] A.C. at 365), consequently if the defect is such that a reasonable man should have known of it, ignorance on the part of the occupier will not excuse him (*Salmond on Torts*, 9th ed., p. 520; *King v. Arlington Court, Ltd.*, 1952 (2) S.A. 23 (C)). The degree of imputed knowledge increases with the danger for, if the occupier is engaged in an extremely dangerous pursuit, a higher degree of diligence is required of him (*Wilson v. Birt (Pty.) Ltd.*, 1963 (2) S.A. 508 (D) at 511). In this case a building contractor was held liable for the fall of a pole, which had previously formed part of the scaffolding and which was being dismantled, upon plaintiff. See also *Billings v. Riden* [1957] 3 All E.R. 1 (H.L.). A notice exempting the landowner from negligence is not however an adequate warning of danger (*Ashdown v. Samuel Williams & Sons, Ltd.* [1957] 1 All E.R. 35 (C.A.)). The position would, possibly, be otherwise if a notice to trespassers and robbers makes it quite clear and apparent that there is a real danger of breaking into the premises concerned at their own risk (cf. *Ex parte Minister of Justice: in re S. v. Van Wyk*, detailed below, p. 199).

Persons under disability

The duty to exercise care will be proportioned to the known condition of the person at the time when coming on to the premises (*Cecil v. Champions, Ltd. (supra)*). No doubt the proprietor of a shop (*ibid.*), or of a public park (*Glasgow Corporation* case), or a municipality controlling a street (*Blumrick v. East London Municipality*, 1934 E.D.L. 24; *Hammerstrand's* case, *supra*), is entitled to assume in the ordinary way that those who come upon the property are normal persons in normal condition. If, however, the occupier has notice to the contrary, a duty will be thrown upon him to exercise such further care as is reasonable in the circumstances, which, in the case of a shop, may entail some degree of assistance or supervision (*Cecil v. Champions, Ltd. (supra)*), but see *R. v. Evans*, 1946 P.H.,

H. 18 (N), quoted *post*, p. 212). A particular case is *children*; this is discussed in a special section below.

THE TRESPASSER

It is in respect of the trespasser that our law departs most widely from the English law. In England, as has been said above, to the trespasser no duty of care, whatever is owed since a man trespasses at his peril (see *Adams v. Naylor* [1944] 2 All E.R. 21). This is not the law of South Africa (*Farmer v. Robinson G.M. Co.*, 1917 A.D. 501). The question whether a duty of care is owed towards a trespasser depends, in our law, upon **whether his presence should reasonably have been anticipated** (Dig. 9.2.31). In most instances, such presence would not reasonably have been foreseen, and in such cases no duty is owed to him. But where his presence should have been foreseen, the occupier must observe due and reasonable care to such possible trespasser (*Fourie v. Du Preez*, 1943 T.P.D. 50; *Cardoso v. S.A.R. & H.*, 1950 (1) S.A. 773 (W) at 780; *Burton v. Cotton Research Board*, 1950 (4) S.A. 34 (S.R.)). However, even if an occupier does anticipate the presence of trespassers, but has done everything possible to warn them from keeping out (e.g. by notices in both official languages that a burglar breaking into a shop is liable to be injured or killed by a spring gun at night-time) he could evade liability for the death of a house breaker (*Ex parte Minister of Justice: in re S. v. Van Wyk*, 1967 (1) S.A. 488 (A.D.)). Here it was held that the State had failed to show what else the accused could have done to protect his shop property from repeated incursions. An occupier who ventures to protect his property by means of electrified wires should, however, exercise extra precautions to prevent his own servants from coming into contact therewith when on their lawful business (*R. v. Puttock*, 1967 R.L.R. 186 (A.D.)).

Whether the presence of a trespasser should have been foreseen is a question of fact in each case. Most of the South African cases deal with excavations near public roads, but such English cases as *Cooke v. Midland Railway* and *Addie & Sons v. Dumbreck* (*supra*) at 147 indicate circumstances in which, from the fact that persons frequent property without permission, their presence there should be anticipated. The latter case would no doubt be decided differently in our courts.

In *Fourie v. Du Preez*, 1943 T.P.D. 50, the plaintiff was taking a short cut through a fenced camp where animals were grazing and was set upon and injured by dogs belonging to the defendant. The latter was alive to the possibility of trespassers on his property and kept the dogs for the purpose, *inter alia*, of providing against the menace of Native trespassers. Held, that the steps taken by the defendant were unreasonable, and that his negligence in this respect entitled plaintiff to damages.

The measure of the care to be exercised towards the trespasser will depend upon all the circumstances, 'among them being the probability of the exercise of greater circumspection by the trespasser than by the person using his accustomed rights'. In most cases an adequate warning will be sufficient (cf. *Veiera v. Van Rensburg* 1953 (3) S.A. 647 (T)), but if other trespassers have removed all obstructions and the wires of a fence it may be that another cannot claim notice of warning of a hidden danger (*Min. of Justice v. Johannesburg C.C.*, 1953 (2) S.A. 631 (T), 1954 (1) S.A.

80 (A.D.)). In the case of **excavations**, to which trespassers may reasonably be expected to come at night, the warning must be adequate in view of that circumstance—it need not be a fence, for a line of stones or a ditch will probably be sufficient (see *Fleming's case*, 1905 T.S. at 117); but where the trespassers are children, special considerations will apply—see the section on Children (see below and *post*, p. 207).

Damages will now have to be apportioned when the trespasser has himself been negligent in failing to keep a proper look-out (cf. *Minister of Justice v. Johannesburg C.C.*, 1954 (1) S.A. 80 (A.D.)).

As stated in the authorities the duty extends to a trespasser whose presence might have been anticipated. Does this mean that the individual himself might have been expected to be present; or that trespassers in general might have been expected; or that trespass might have been expected by a class of whom the plaintiff is one? A similar question was discussed (*supra*, p. 181) in respect of trespassers on vehicles. In respect of entry upon property (land or buildings) it seems quite clear that if the plaintiff can show that he falls within a class of persons whose presence the occupier might have expected (e.g. children in the habit of entering and playing upon the property), the duty will be owed to him (see *Fourie v. Du Preez*, 1943 T.P.D. 50; *Burton's case*, 1950 (4) S.A. 34 (S.R.)). But if the presence of such a class might have been expected, can someone, not falling within it, claim the protection of the duty? On principle it would appear that he can, since it is the presence of persons in general, and not of individuals, which creates the duty; but he will have a claim to damages only if he can show that precautions which would be dictated by the anticipated presence of persons of that class would have availed to protect him. In *Clingen v. Ross*, 16 S.C. 152, plaintiff's son fell into an unfenced excavation; the excavation adjoined a public road, but the child fell into it, not near the road or in the course of using the road, but at a point some 70 feet from the road. Here De Villiers C.J. held that there was no claim, since there was no connection between the accident and the fact that the excavation was near the road. In other words, *semble*, precautions dictated by the proximity to the road would not have availed to prevent the accident. (See also *post*, p. 431).

In *Cardoso v. S.A.R.*, 1950 (1) S.A. 773 at 780, the Court rejected the contention that the users of a railway yard do so at their own risk and held that the Administration was liable in damages for persons injured by moving trucks.

CHILDREN AND ALLUREMENTS

Where the occupier should expect the presence of children, he owes a special duty, because, on the one hand, he cannot expect them to take as much care for their own protection as would an adult (*Lewis v. Carmarthen-shire C.C.* [1955] 1 All E.R. 565 (H.L.); *Cuttress v. Scaffolding G.B. and others* [1953] 1 All E.R. 165), and, on the other hand, he should realize the possible effect of some attractive object on children as an *allurement* which may attract them to play with or upon it and so injure themselves (see *Farmer v. Robinson G.M. Co.*, 1917 A.D. 501 at 524; *Bellstedt v. S.A.R.*, 1936 C.P.D. 399; *ante*, p. 25). The occupier is entitled, however, in deciding what precautions are necessary, to take into consideration the

fact that children, who are too young to look after themselves, are normally under the protection of adults (*ibid.*); so that in respect of dangers which are 'familiar and obvious' no special precautions need, in the ordinary case, be taken in respect of such children (per Lord Shaw, *Glasgow Corporation v. Taylor* [1922] 1 A.C. at 60-1 (case of a public park) and applied in *Johannesburg Municipality v. Venter*, 1936 T.P.D. 287, to child on tram). If, however, he knows that in fact children come upon the property who are not under such protection, he must take this into account (*arguendo* from *Cecil Champions, Ltd.*, 1933 O.P.D. 27, see also *Clingen v. Ross*, 16 S.C. 152 and *post*, p. 206).

When stakes put up in a children's playground were allowed to become overgrown and hidden, and a mound was thrown up near by, it was held (Wessels J.A. dissenting) that the whole constituted a danger, in view of the likelihood of children playing on the mound (*Transvaal Provincial Administration v. Coley*, 1925 A.D. 24). In *Farmer v. Robinson G.M. Co.*, 1917 A.D. 501, it was held that a horizontal wheel close to the ground was not an 'allurement' which it should have been anticipated that children would play on (cf. *Ross v. Salisbury G.M. Co.*, 1910 W.L.D. 158). It has been ruled, however, that the defendant was negligent in depositing hot ashes on the corner of a commonage, and a child, who walked on them barefoot, recovered damages (*Hirschman v. Kroonstad Municipality*, 1914 O.P.D. 37).

In *Bellstedt v. S.A.R.*, 1936 C.P.D. 399, it was decided that an open carriage-door in a moving train was not an 'allurement'. But a corporation can be held liable for allowing a bush, carrying poisonous berries, to be unguarded in a public park (*Glasgow Corporation v. Taylor* [1922] 1 A.C. 44).

ENGLISH CASES ON ALLUREMENT

Morley v. Staffordshire C.C. [1939] 4 All E.R. 92 (C.A.): The defendants were held not to be liable for an injury caused to a child of 6 years when playing with sand and then colliding with a stack of metal near by in the repair work, on a highway which had been roped off, since the sand was not an allurement to children.

Culkin v. McFie & Sons, Ltd. [1939] 3 All E.R. 613 (L.S.A.): For the purpose of collecting spilt sugar, a child ran out to a lorry carrying bags of sugar, one of which was broken causing sugar to escape on to the highway. Held that, as the driver had had previous trouble with boys running out of the school for this purpose and as nothing was done to cover or protect the sacks, the sugar was an allurement to the child and, accordingly the defendant was held liable in damages.

Walder v. Hammersmith Borough Council [1944] 1 All E.R. 490 (K.B.): The defendants were held not liable where a child of 11 years had trespassed into an air-raid shelter, cut the electric cable with a pair of pliers, thereby being electrocuted. This case should be compared with the decision in *Buckland v. Guildford Gas Light & Coke Co.* [1948] 2 All E.R. 1086 (K.B.), where defendant had erected high voltage electric wires traversing a large oak tree which was cut away to permit the passage of the wires. No danger notice was put up and a child of 13 years, in climbing the tree, touched the wires and died as a consequence. Held, that the defendants were liable in negligence.

Shiffman v. Order of St. John [1936] 1 All E.R. 557 (K.B.): The defendant, at the request of the police, had erected a casualty tent, to provide first aid to people in a crowded place, but had failed to see that the tent pole was insufficiently protected from children swinging on the four guy ropes, with the result that it fell and injured plaintiff. Held, that the defendant was liable in damages.

Creed v. John McGeoch & Sons, Ltd. [1955] 3 All E.R. 123: Here the defendants had left a trailer, which was dangerous and attractive to children, on a highway at a place

where children were known to play. The result was that a girl, aged 5 years, in conjunction with other children used the trailer as a 'see-saw' and was injured. Held, that the defendants had been negligent.

Gough v. National Coal Board [1953] 2 All E.R. 1283 (C.A.): To leave, unfenced, a railway track near houses and swimming-baths and adjoining land where children played was held to be an allurement to children to ride on the buffers of the defendant's trucks.

EXTENT OF DUTY—PERSONAL EQUATION

The duty is to make the property 'reasonably safe', and in this connection regard must be had to what is termed the 'personal equation' (*Norman v. Great Western Railway Co.* [1915] 1 K.B. 584). The judgment of Phillimore L.J. was quoted with approval in *In re S.S. Winton*, 1938 C.P.D. at 265, by Centlivres J.:

'One must take into account what is called in modern parlance the *personal equation*; what may not be safe for one person may be safe enough for the persons who frequent particular business premises. For instance, in loading a ship in a dock, a gangway consisting of a plank without a handrail may safely be provided, though its narrowness or slope may be such that ordinary persons, not accustomed to ships, may not find it easy to use, because the stevedores and seamen who are to use it can use it safely. The gangway has to be safe for the class of persons who use it on business and, so far as any complaint is concerned, it has to be reasonably safe for him. If it is safe for him it does not matter whether it is not safe for anybody else. It is for that reason that the element of knowledge comes in.'

LIABILITY FOR ACTS OF OTHERS

If an occupier places an object on the property, or creates a situation, which is not dangerous in itself but which is rendered dangerous by the act of some third party over whom he had no control, the question whether he will be liable for resulting damage will depend principally on whether he should have anticipated the likelihood of such act of a third party. This question is discussed (*ante*, p. 33).

Illustrative cases in the present branch of the law are *Joubert v. Scot Guthrie & Co.*, 1903 T.S. 214, where a trapdoor was left open, and *Roth v. Fram*, 1929 T.P.D. 388, where an obstruction was left in a passage. (As to open and unguarded hatches on ships, see *ante*, p. 190).

Apart, however, from the question of anticipation, the problem arises whether, if the occupier has knowledge of the existence of some dangerous object or condition on his property, not created or in any way contributed to by himself, he owes a duty to take precautions against damage being caused to those coming upon the property. A similar question arises in respect of damage caused, not to those who come upon the property, but to neighbouring owners. It seems advisable to discuss the two questions together and they are therefore dealt with in a subsequent section in this chapter (*post*, p. 216).

WHO IS AN 'OCCUPIER'?

We have spoken consistently of the 'occupier' of property. By this is meant the **person in effective control** of the property, in respect of the dangerous condition, whether as owner, lessee, or on other tenure (*Spencer v. Barclays Bank*, 1947 (3) S.A. 230 (T); *Elgin Fireclays, Ltd. v. Webb*, 1947 (4) S.A. 744 (A.D.) at 751; *Crawhall v. Minister of Transport*, 1963 (3) S.A. 614 (T) at 617). In most cases he will be the occupier in fact; but

not necessarily so in all cases. As between landlord and tenant, for example, the liability for damage caused by a failure to repair will fall upon whichever of them had control for purposes of repair—that is, on the party whose duty it was to repair under the contract or at common law. So in *Cape Town Municipality v. Paine*, 1923 A.D. 207, where the lease provided that the lessor should repair the exterior of the structures on the land demised, and an accident was caused by disrepair of seating accommodation which formed part of such exterior, the landlord was held liable to the third party injured. Contrast *Weineck v. Mitchell & Arneil*, 1935 E.D.L. 450, where the owner of premises was held not liable for the acts of the lessee in making a floor, safe in construction, dangerously slippery.

EXCAVATIONS

(a) *On Property*

The question whether it is negligent to leave an excavation on private property unprotected will depend on whether it should be foreseen (a) that persons might come upon the land, and (b) might fall into it (*Hammerstrand v. Pretoria Municipality*, 1913 T.P.D. 374 at 377). As to (a), the common case is where the excavation *adjoins a public road*, or a road used by the public, as in *Wright v. Patterson*, 5 S. 29, and the test of liability depends upon an answer to the question whether the person making the hole should have foreseen the possibility or probability of a wayfarer losing his way at night and wandering from the roadway into the excavation (*Stewart v. Johannesburg C.C.*, 1947 (4) S.A. 179 (W)). Each case must be governed by its own facts, consequently the distance from the roadway, degree of visibility, whether the highway is fenced or not, whether the road is distinguishable from land through which it leads, are all important elements to be considered. The court will also consider whether the hole, or quarry, was fenced off or not (*Elgin Fireclays v. Webb*, 1947 (4) S.A. 744 (A.D.)). Here the defendant had dug a pit on ground adjoining that usually used by animals for grazing, but failed to fence it off. Where a hole was 51 feet from the road, the intervening ground being bushy, the Court decided that it could not reasonably have been anticipated that a person would stray off the road into it (*Transvaal & Rhodesia Estates v. Golding*, 1917 A.D. 18). Where, on the other hand, the hole was 82 feet from the road but the intervening ground was bare, the opposite conclusion was reached (*Fleming v. Rietfontein Deep G.M. Co.*, 1905 T.S. 111). In *Caseley v. Bristol Corporation* [1944] 1 All E.R. 14 (C.A.), however, liability was avoided where the deceased had, on a foggy night, wandered off the road some 47 feet and fallen into a dock basin.

Where the excavation does **not adjoin the road**, the decision will usually turn upon the capacity in which the person injured came there, and whether the danger was obvious. In *Skinner v. Johannesburg Turf Club*, 1907 T.S. 852, the plaintiff's horse, while exercising on the defendant's property by licence only, fell into an open and patent excavation, and the plaintiff was unable to recover. In *Webster v. Randfontein Estates Co.*, 1911 W.L.D. 115, plaintiff, probably a trespasser, fell into a hole when walking at night where he knew there were obstacles such as machinery and he failed to recover. See, also, *Botha v. Miodownik & Co. (Pty.) Ltd.*, 1966 (3) S.A.

82 (W), where a building contractor was held liable for failing to barricade a hole leading to the basement of a building under construction, which hole, although no danger to workmen during day-time, was a danger to them at night-time.

In *Clingen v. Ross*, 16 S.C. 152, it was decided that the owner of land was not liable in damages for injury sustained by a child through falling into an excavation made by such owner on his land at a spot not resorted to by children and away from a public road. In *Burton v. Cotton Research Board*, 1950 (4) S.A. 34 (S.R.), on the other hand, damages were awarded to a trespasser using a private road as a short cut, where it was shown that the existence of an alley and the drop into it was not readily apparent at night to one using ordinary care, and hence it was a *hidden danger*. Held, further, that the degree of care which an intent and careful look implied was not required of the plaintiff and, accordingly, he was not guilty of contributory negligence.

(b) *In Streets*

Where the excavation is made in a road or street, by the proper authority, the question at issue will be whether adequate warning was given by lights or barriers: on this see *Hammerstrand's case*, 1913 T.P.D. 377; *Volkstrust Municipality v. Adendorff*, 1922 T.P.D. 212; *Blumrick v. East London Municipality*, 1934 E.D.L. 24; *Kinnear v. Transvaal Provincial Administration*, 1928 T.P.D. 133; *Frank v. Van Rooy*, 1927 O.P.D. 231; *Steyn's case*, 1927 O.P.D. 26. (See also *post*, p. 389.)

Municipal regulations commonly provide that all dangerous excavations must be fenced. Such a provision will not usually be of much assistance in a civil action since, if the excavation is dangerous to the public, it will be negligence at common law to leave it **unprotected**; and it is only to such dangers that such a by-law will apply (see *Clingen v. Ross*, 16 S.C. 152). Thus in *Shrog v. Valentine*, 1949 (3) S.A. 1228 (T), the defendant had excavated a trench as part of sewerage works he had contracted to carry out. He had erected a two-wired fence supported by four standards, one placed at each corner of the trench. There were no lights and nothing was hung on the wires between the standards. There was nothing else to indicate the trench other than a mound about 18 inches high which was the same colour as the road. The plaintiff drove into it at dusk and sustained damages. Held, that the defendant had been negligent and that the plaintiff had not been contributorily negligent. In this case the dictum of Wessels J.P. in *Volkstrust Municipality v. Adendorff*, 1922 T.P.D. at 115, was cited with approval:

'It seems to me that there is a very wide difference between a person who runs into an object that is lawfully on the street—an object that stands out and is silhouetted against a background—and a person who runs into a trap. An excavation in a street, that is deliberately made, is not such a thing as one would expect, and not such a thing as one would keep a keen look-out for. . . . If a man, walking in a well-defined street, comes upon an obstruction or excavation which is easily visible a long way off and he carelessly walks into it, it is quite possible that he might be guilty of contributory negligence in running into the obstruction.'

See also *Stewart v. Johannesburg City Council*, 1947 (4) S.A. 179 (W), where it was held that the ordinary pedestrian does not usually proceed with his

eyes glued to the ground and that if a local authority creates a danger in performing work on a sidewalk, it is its duty to take adequate steps to guard the public from such danger. Reliance cannot always be placed on the nature and character of the work itself to draw attention to unguarded excavations on a sidewalk. In *Steyn v. O.F.S. Provincial Administration*, 1927 O.P.D. 26, the plaintiff was driving a cart along a public road in the half-light before dawn. He could not see more than 12 yards. He deviated out of the road for a few yards and collided with a mound 19 inches high. Held, he was entitled to damages. Compare, however, *Minister of Justice v. Johannesburg C.C.*, 1954 (1) S.A. 80 (A.D.) below.

As to a mines regulation, see *Golding's case*, 1917 A.D. 18, and *Berkowitz's case*, 1927 T.P.D. 610.

Illustrative cases

In the case of *Port Elizabeth Municipality v. Hartel*, 1940 E.D.L. 139, the council had caused a trench to be dug across a public road and adjoining a tram-line. 'Road closed' boards were placed on three sides of the trench, but not at the tram-end side of it. Red lamps were also hung up. Here the Court was of the opinion that what was done was reasonably sufficient to put people on their guard and that the plaintiff could not succeed in his claim for damages occasioned by his falling into the trench.

In *Van Heerden v. Worcester Municipality*, 1946 C.P.D. 157, the municipality had dug a trench for laying an electric cable. The sand in the filled-in trench had subsided, causing a hole 5 to 8 inches deep in the pavement. Held, that the council was not exercising permissive powers as an 'authorized undertaking' and that, having created a potential danger, it should have taken care that the work did not become an actual danger, and that it was, consequently, liable in damages.

Hammerstrand v. Pretoria Municipality, 1913 T.P.D. 377: Where pedestrians fell into an excavated trench at night, it was held that as there were inadequate lamps lighting the trench, the municipality was liable.

Volksrust Municipality v. Adendorf, 1922 T.P.D. 212: Damages were awarded to a motorist driving into an unlighted and unprotected excavation in a street and parallel with its course.

Blumrick v. East London Municipality, 1934 E.D.L. 24: Where a pedestrian fell at night into a trench lit by four lamps, it was held that he was guilty of contributory negligence.

Kinnear v. Transvaal Provincial Administration, 1928 T.P.D. 143: The plaintiff in a motor at night proceeding along a new road under construction, drove into an excavation. No warning signs or barriers had been put up at the point of intersection of the new and old roads nor any warning of the excavation itself. Held, defendant was liable, as it was a trap.

McLaughlin v. Koenig, 1928 C.P.D. 102: The plaintiff, a lodger at an hotel, was awakened by fumes and smoke and endeavoured to escape from the hotel premises. In doing so he was badly burnt. Held, that as he had failed to prove negligence on the part of the defendant hotel proprietor his claim must fail.

Sangster v. Durban Corporation, 1934 N.P.D. 347: Plaintiff claimed damages from defendant corporation on the ground that it permitted certain matting to remain in a torn and damaged condition on the floor of a pavilion in such a way as to constitute a danger inasmuch as persons coming on the premises were liable to trip.

Fleming v. Rietfontein Deep Gold Mining Co., 1905 T.S. 111: Where a mining company sank a shaft 82 feet from a public road and left it unfenced, and the circumstances were such that the company ought to have foreseen that such shaft might in all probability become a source of danger to anyone straying off the highway for a short distance, it was held that the company was liable in damages at the suit of a person who had strayed from the road in the dark and received injuries from falling into the shaft.

Cape Town Municipality v. Paine, 1923 A.D. 207: The municipality, the owner of certain athletic grounds and a grandstand, leased the premises. The lease provided *inter alia* that the lessors should 'as far as they deem it necessary repair the exterior of the buildings and other structures on the grounds'. During the currency of the lease, plaintiff, a spectator at a sports meeting, put his foot through the woodwork of the flooring and sustained injuries. Held, he was entitled to damages.

Farmer v. Robinson G.M. Co., 1917 A.D. 501: A mining company carried on operations on a piece of ground adjoining a park and separated from it by a fence in which there was a gate. The company's servants knew that children got into a cutting on the premises but not that they used a wheel as a plaything, nor was the wheel of such a nature that a reasonable person should have anticipated that it would attract children to play with it. Held, the company was not liable in damages to a child who, having come through the barbed-wire fence guarding the cutting, played on the wheel and injured himself (trespass case).

Lewis v. Carmarthenshire C.C. [1955] 1 All E.R. 565 (H.L.): A person who allows a young child to stray on to a busy street should anticipate, not only that the child might be injured, but also that other users of the road might be injured in endeavouring to avoid the child.

Cuttress and others v. Scaffolding G.B. and others [1953] 1 All E.R. 165: Children were injured while playing on some scaffolding which collapsed. Held, the defendant was liable in damages.

Frank v. Van Rooy, 1927 O.P.D. 231: A pedestrian fell into a hole guarded by an unlighted lantern. Held, he was entitled to damages.

In *Stewart v. Johannesburg City Council*, 1947 (4) S.A. 179 (W), the plaintiff had fallen into an excavation which had been left entirely unguarded and with no warning signs to apprise pedestrians using the side-walk. The defence relied on the contention that the excavation was plainly visible to anyone using the side-walk who kept a proper look-out, but Price J. held that a pedestrian cannot be expected to have his eyes glued on the ground and that he looks at people, shop windows and other things, and, consequently, there was no contributory negligence on his part.

Where an excavation was made some 47 feet from the road, for the purpose of a dock basin, it was held that the corporation was under no liability to fence the basin, for while it may be presumed that persons will, on dark nights, stray somewhat from the highway yet this was a danger so far removed from the highway as to remove the excavators from liability to travellers on that highway (*Caseley v. Bristol Corporation* [1944] 1 All E.R. 14).

Minister of Justice v. Johannesburg City Council, 1954 (1) S.A. 80 (A.D.): A police constable, while pursuing suspects at night-time, fell into a municipal drain and received injuries. Held, he should have been aware of the cross-bars which formed some sort of obstruction to the drain and, having failed to keep a proper look-out, the appeal was dismissed with costs. This seems to be a hard case and would, today, be made the subject of apportionment of damages.

PUBLIC RESORTS AND SWIMMING-BATHS

The occupier of or body owning a public resort, knowing that it is open to the public, should exercise care in providing facilities, structure or equipment. Consequently where he, or it, knows, or by reason of its occupation ought to have known, of a dangerous state of affairs, he may be mulcted in damages for *culpa* (*Paine v. Cape Town Municipality* (*supra*)). Thus in *Cecil v. Champions, Ltd.*, 1933 O.P.D. 27, where the owner of a shop was sued in negligence for permitting the existence of a dangerous stairway, the Court found that the stair was not dangerous to **sober** customers. Per De Villiers J.P.: 'the occupier need not take precautions against a mere possibility of harm, not amounting to such a likelihood as would be realized by the reasonable prudent man.' Further observations were made on the duty where it is known that a customer is under a disability—very

young, blind, intoxicated or otherwise abnormal. In *Le Roux v. Roodepoort-Maraiburg Municipality*, 1927 W.L.D. 41, where the municipality provided bathing facilities in a dam, it was held not to be negligent to fail to have notices indicating depths, although Krause J. indicated that such notices might reasonably be expected in a specially constructed swimming-bath. In *Prior v. S.A.R.*, 1935 O.P.D. 123, a portion of a river under defendant's control was, to its knowledge, used for swimming. In constructing a bridge defendant drove piles into the bed of the river; all visible obstructions were removed but not the piles. Held, that though swimmers (as licensees) must take the risk of natural dangers, the piles constituted a hidden danger or 'trap' rendering the defendant liable.

These bathing-pool cases should be compared with the decision in *Simmons v. Mayor, etc. of Huntingdon* [1936] 1 All E.R. 596 (K.B.), wherein it was held that the act of placing a diving board without any warning in a public swimming-pool at a point where there was insufficient depth of water was negligence and that the defendants were liable to plaintiff whose son had dived in and broken his neck.

In regard to public resorts, where **children** are to be expected, the English decisions are instructive. In *Dyer v. Ilfracombe Urban D.C.* [1956] 1 All E.R. 581 (C.A.) the defendant was held not liable where a child (unaccompanied) had fallen from a slide chute in a children's playground, since there was no obligation to put up a notice that very young children are not permitted, nor to provide a keeper to prevent their falling through the adequate rails at the top of the chute. In this case the decision in *Bates v. Stone Parish Council* [1954] 3 All E.R. 38 (C.A.) was distinguished. Here an accident happened in similar circumstances but the additional protecting rails had either rusted or broken away and had not been replaced. Similarly in *Cuttress and others v. Scaffolding, Ltd.* [1953] 2 All E.R. 1075 (C.A.) it was held that the defendants were not liable in negligence in erecting a scaffold to a bomb-damaged house to repair it. Here a child had climbed the scaffold, untied a rope, and threw it down to his playmates who proceeded to pull on the scaffold until it fell down, injuring one of them, and it was held that this was not a foreseeable event (see *ante*, p. 200).

Station platform

Where, following a snow-storm, snow fell on a platform of a railway station where it became slippery and where the only porter available promptly started to put salt and sand on the snow, it was held that the plaintiff, who, in alighting from a train, had fallen and hurt herself, could not recover damages on the ground of defendant's negligence (*Tomlinson v. Railway Executive* [1953] 1 All E.R. 1 (C.A.)).

Public seating

The duty of a person or public body to provide adequately safe seating accommodation for persons paying for such seating privileges is illustrated in the case of *Cape Town Municipality v. Paine*, 1923 A.D. 207. The case of deck-chairs provided for the use of the public and which various members of the public may have moved from time to time before being occupied by the plaintiff, does not however, raise an inference of negli-

gence on the application of the *res ipsa loquitur* rule, and the plaintiff must still prove negligence on the part of the corporation servants (*Durban Corporation v. Neugarten*, 1955 (1) P.H., J. 7 (N)).

Slippery drive to hotel

Through some stones, of which an hotel drive was made up, having become shiny, part of the drive a quarter-mile from the hotel became slippery. A guest at the hotel slipped on that part, fell, and was injured. Held, that the proprietors at the hotel were under a duty towards the guest to take reasonable care to see that the drive was in all respects reasonably safe for the purpose for which it was to be used, but there was no implied warranty by them that the drive was safe as reasonable care and skill could make it, and the mere fact that part of the drive was slippery was not evidence of failure to take reasonable care (*Bell v. Travco Hotels, Ltd.* [1953] 1 All E.R. 638 (C.A.)).

OBSTRUCTIONS IN STREETS

It is clearly negligent to leave unlighted or unguarded obstructions in streets (see, e.g., *S.A.R. v. Estate Saunders*, 1931 A.D. 276). The question of liability turns upon the adequacy of protection and on contributory negligence: as to which see the observations of Feetham J. in *Kinnear's* case, 1928 T.P.D. at 143. In *Pretoria Municipality v. Wolhuter*, 1930 T.P.D. 761, it was ruled, on exception, that it may constitute negligence to allow trees, planted by the municipality, to overhang a street and so create an obstruction. (See also *Naanyane's* case, *ante*, p. 157.) Where therefore a local authority, engaged on roadwork, erects a barrier in the middle of a busy thoroughfare where visibility conditions are poor, it is quite insufficient, in relation to motorists, merely to put up a warning sign 'Drive Slowly'. It fails in its duty if it does not provide some effective form of illumination in order to give adequate warning to road users of the presence of such barrier (*Cape Town Municipality v. Lassen*, 1964 (3) S.A. 429 (C)).

Unlighted traffic islands may also fall within this category. Thus in *Brakpan Town Council v. Moore*, 1947 (3) S.A. 97 (T), the plaintiff was awarded damages for colliding with the concrete kerb of such traffic island, which had normally been demarcated with a beacon showing a warning light, but which beacon had, at the time of the collision, been removed for repair. (In this case it was proved that the plaintiff was exonerated from blame for the damage he suffered by reason of the fact that he had been temporarily blinded by the lights of an oncoming car.)

In *Durban Corporation v. Milne*, 1939 N.P.D. at 493, the corporation, though it had provided five lamps to give warning of an obstruction in a street, was held liable in damages because it had failed to provide the very best type of lamp; as a consequence they all failed to keep alight in wet and windy weather. See also *Polkinghorn v. Lambeth Borough Council*, [1938] 1 All E.R. 339; *post*, p. 389.

On the other hand a traveller should realize that a visible barricade across a road is set there for a purpose and he should not proceed further, especially at night-time, without exercising due care (*Minister of Justice v. Johannesburg C.C.*, 1954 (1) S.A. 80 (A.D.) at 84). For a case in which

the defendant was held liable for erecting an unobservable barrier see *R. v. Burger and another*, 1959 (2) S.A. 110 (T). Here the accused had closed an entrance road to a farm by erecting a wire fence and a farmer, who had that morning used the unclosed road, had, while travelling back at dusk, been unable to see the wires when he was only a few paces away with the result that his wife, who was travelling with him in his tractor, was thrown off and killed. In this case the Court ruled that the accused had rightly been convicted of culpable homicide, by reason of his failing to erect any adequate warning of the obstruction. (See also *ante*, p. 141.)

BUILDINGS

The duty of an occupier of a building is not absolute, since he is not an insurer. He can be liable only for such defects, or dangerous conditions of which he was, or should have been, aware and in failing to take reasonable precautions against damage or injury to others (*Cecil v. Champions, Ltd.*, 1933 O.P.D. 27, digested above, and *Hunter v. Cumnor Investments*, 1952 (1) S.A. 735 (C) (water flooding). Thus *Union Meat Co. v. Mitchell Cotts*, 1920 C.P.D. 515, where defendants put an upper story to an ordinary use, but owing to a defect not apparent on inspection, the floor fell through on to plaintiff's premises, the defendants were held not liable. If, therefore, owing to a dangerous condition, of which the defendant had notice, a ceiling falls on the hirer of a post office box, the defendant is liable (*Liddell v. Transvaal Govt.*, 1906 T.S. 863). See also *Sissing v. Asp G.M. Co.*, 1917 S.R. 123, where a staging collapsed. In *Cape Town Municipality v. Paine*, 1923 A.D. 207, a spectator at a sports gathering, who was injured owing to the defective condition of the stand, recovered damages from the defendant as the party responsible for repairing it, or keeping it safe.

In the construction of a reinforced concrete building the engineers are not entitled to assume that the contractor's foreman is competent enough to do the concreting without displacing the steel rods from their proper position (*Joffe & Co. v. Hoskins*, 1941 A.D. 431). In *Small v. Goodreich Buildings*, 1943 W.L.D. 101, plaintiff, who was employed by contractors in erecting a heating system in the basement floor of a building where four or five pits, covered with boards 3 to 6 inches apart, were distributed irregularly in the said basement which was poorly lit the Court decided that, notwithstanding the provisions of sections 4(1) and 45(1) of the Workmen's Compensation Act, No. 59 of 1934, the defendant was liable at common law and that plaintiff had not been guilty of contributory negligence. *Per curiam*:

'The obligation rests upon a person who creates a danger like the pits in the basement to take reasonable steps to neutralize the danger by adequate protective covering and also, if necessary, by the provision of sufficient artificial light.'

This decision was followed in *Botha v. Miodownik & Co. (Pty.) Ltd.*, 1966 (3) S.A. 82 (W), where a hole had been left by a contractor in the floor of a building under construction. A workman of a subcontractor fell into it at night-time and it was held that, since the defendant should have barricaded it he was 80 per cent liable in damages. For the liability of a contractor to a workman in respect of defective scaffolding, see *Simmons v. Bovis, Ltd.* [1956] 1 All E.R. 736.

Slippery floors

A shopkeeper should see to it that his shop floor is kept reasonably safe, and if an unusual danger is present of which the customer is unaware and would not expect to be present, the onus of proof is upon the defendant to explain how the accident happened (*Alberts v. Engelbrecht*, 1961 (2) S.A. 644 (T) at 646). Thus where a customer in a shop slips on a cabbage leaf, negligently left on the floor of the shop by the defendant's assistant, the plaintiff customer is entitled to succeed in her claim for damages without apportionment (*Gordon v. De Mata*, 1969 (3) S.A. 285 (A.D.)).

A dangerously slippery floor will, therefore, be a ground for liability (*Sangster v. Durban Corporation*, 1934 N.P.D. 347). See also *Kennedy v. Davis & Davis*, 1944 P.H., J. 15 (N), where the defendant's servants had applied polish to the landing of a stairway of a block of flats and where the Court awarded substantial damages. There must, however, be no negligence on the part of the plaintiff (*Newton v. Proctor*, 1937 N.P.D. (J/C 167/37)). Nor will the landlord be liable if the dangerous condition has been created, or brought about, at the hands of the tenant himself, as where he had oiled the floor (*Weineck v. Mitchell & Arneil*, 1935 E.D.L. 450). The mere fact that plaintiff fell, however, does not raise the inference of negligence (*Philpott v. Dairy Supply Co.*, 1934 N.P.D. 331; *Koenig v. Hotel Rio Grande*, 1935 C.P.D. 93). For other instances where a tenant successfully recovered damages for injury, sustained by slipping on a freshly polished granolithic floor, see *Shainboun v. Wellington Court, Ltd.*, 1938 P.H., J. 20 (W), and *Spencer v. Barclays Bank*, 1947 (3) S.A. 230 (T).

For English authorities imposing of liability for injuries caused by slippery or polished floors see *Weignall v. Westminster Hospital* [1936] 1 All E.R. 232 (C.A.); *Pitt v. Jackson* [1939] 1 All E.R. 129 (K.B.); *Turner v. Arding & Hobbs* [1949] 2 All E.R. 911 (K.B.), and for a slippery courtyard of flats see *Anderson v. The Guinness Trust* [1949] 1 All E.R. 530 (K.B.). See, also, *Stowell v. Railway Executive* [1949] 2 All E.R. 193 (K.B.); *Slade v. Battersea & Putney Group Hospital* [1955] 1 All E.R. 429 (Q.B.); and *Turner v. Arding & Hobbs, Ltd.* [1949] 2 All E.R. 911 (K.B.) (vegetable matter left on the floor).

As to danger from fire, and the provision of a fire-escape, see *McLaughlin v. Koenig*, 1928 C.P.D. 102, and the chapter on Fire, and for the position as between landlord and tenant, which is contractual, see *Poynton v. Cran*, 1910 A.D. 205.

The question of removal of support as between buildings appertains not to negligence but to proprietary rights; whether a right of action on the ground of negligence can ever arise is discussed in the General Chapter (*ante*, p. 18).

Stairways in flats or buildings

While in contract it is a rule of common law that a landlord is not liable to the tenant for the defects in the building leased of which the landlord was *unaware* and which developed during the currency of the lease the position is otherwise in delict. The stairways in a building containing flats are still in the occupation and control of the landlord-owner of the building, consequently an allegation that the stairway was defective or had insuffi-

cient illumination is sufficient to **imply knowledge** of that fact on the part of the defendant landlord-owner (*King v. Arlington Court (Pty.) Ltd.*, 1952 (2) S.A. 23 (C)). In other words knowledge of defects is imputed to the owner of a structure if, by the exercise of reasonable care, he ought to have been aware of such defect (*Cape Town Municipality v. Paine*, 1923 A.D. 207); *Spencer v. Barclays Bank*, 1947 (3) S.A. 230 (T). See also *Howard v. S. W. Farmer & Son, Ltd.* [1938] 2 All E.R. 296 (C.A.)).

In *Baker v. Bethnal Green M.T.* [1944] 2 All E.R. 301, [1945] 1 All E.R. 135 (C.A.), it was proved that the steps of an air-raid shelter were uneven, inadequately lighted, and there was no handrail provided. There had also been previous complaints of the safety of the stairs. Held, the defendant was liable in damages. In *Mulchay v. Model Delicacy Store*, 1963 (4) S.A. 331 (D), where the defendant's shop had two floors in one room, one 7½ inches lower than the other, both rooms being covered by dark covering with nothing to show that there was any distinction between the two levels, it was held that such state of affairs constituted a trap and that neither the plaintiff (who was a short-sighted person) nor other persons could be expected to keep their eyes on the floor to look for such traps.

In *Joubert v. Scott Guthrie & Co.*, 1903 T.S. 214, however, where a trap-door in the stairs of flats let to several tenants had been left open by one of the tenants, the defendants were exculpated from liability, and a similar decision resulted in *Roth v. Fram*, 1929 T.P.D. 388, where an obstruction had been left in the passageway of the stairs but where the owner was **ignorant** thereof. The owner was, however, held liable in *Buxton v. Real Estate Corporation*, 1903 T.S. 430, where the steps were steep, where the brass nosings to protect the woodwork of the stairs from wearing had become smooth and polished and the nosings themselves were loose.

For English decisions on the question of the landlord in respect of dangerous stairways, see *Huggett v. Miers* [1908] 2 K.B. 278; *Lucey v. Bowden* [1914] 2 K.B. 318; *Dobson v. Horsley* [1915] 1 K.B. 634; *Fairman v. Perpetual Investment Co.* [1923] A.C. 74; *Gaunt v. MacIntyre*, 1914 S.C. 43; *Lane v. Cox* [1897] 1 Q.B. 415; *Cavalier v. Pope* [1906] A.C. 428; *Rochman v. Hall* [1947] 1 All E.R. at 899.

LIFTS IN BUILDINGS

The landlord is not liable for the unauthorized tampering by a third party with the operation of a lift (*Rochman v. Hall* [1947] 1 All E.R. at 895).

Moreover, if a landlord employs an experienced and competent firm of lift engineers to make periodical inspections of a lift, to adjust it and to make reports upon it, he does all that a reasonable man can do towards seeing that the lift is safe (*Haseldene v. C. A. Daw & Sons, Ltd.* [1941] 3 All E.R. 156 (C.A.) at 168). In such case the action would lie against the engineer only, unless it could be established that the landlord disregarded an adverse report by the inspecting engineer concerned. Knowledge is, therefore, crucial to the success of litigation. Thus in *Meltzer v. The Reserve Investment Co.*, 1915 T.P.D. 526, where, owing to a small defect which was not known to the defendant, the plaintiff, in operating the lift found that it would not stop and endeavoured to escape. In so doing he was severely injured. The Court held that he was not entitled to

succed. See also *Kerry v. Keighley Electrical Engineers Co., Ltd.* [1940] 3 All E.R. 399 (C.A.).

GARAGES

While people visiting garages should look out for moving vehicles, the owner and his servants should also exercise care that they do not injure customers on the premises (*Frodsham v. Aetna Insurance Co.*, 1959 (2) S.A. 271 (A.D.)). In this case the appellant had, before walking down a ramp, made certain that there were no cars reversing from the garage. While on the way down he was struck from behind by a reversing car. Held, that the collision was due entirely to the negligence of the car-driver and that the court *a quo* was wrong in apportioning damages.

HARBOURS

As to the obligation of harbour authorities to see that the harbour is safe for incoming shipping, and not to mislead ships approaching at night by the erection of confusing lights, see *In re S.S. Winton: Avenue Shipping Co. v. S.A.R.*, 1938 C.P.D. 247. A harbour authority owes a duty to owners of ships, which it invites to enter and make use of the harbour and its equipment, to use reasonable care to ensure that the harbour and its equipment are safe. It must also protect all ships from injury (Roscoe, *Admiralty Practice*, 5th ed., pp. 85-97; Halsbury, vol. 35, 3rd ed., paras. 1299-302; *Mersey Docks & Harbour Bd. v. Gibbs* (1866) L.R. 1 H.L. 93; *The Moorcock* (1889) 14 P.D. at 66-7; *R. v. Williams* (1884) A.C. 418; *Colonial Steamship Co. v. S.A.R. & H.*, 1949 (3) S.A. 1187 (N) at 1195).

Although the Harbour Administration may not be liable for the acts of its pilots, it will still be mulcted in damages where a port captain has failed to keep his harbour charts up to date in failing to show thereon the existence of a submerged reef and where, as a result, a ship comes into contact therewith and thereby suffers damage (*Shell Tankers, Ltd. v. S.A.R. & H.*, 1967 (2) S.A. 666 (E), for the details of which see *ante*, p. 189).

If a harbour authority introduces a source of danger into the harbour it must take care that no one is injured by it (*In re S.S. Winton (supra)* at 248). In other words, the harbour authority is under a duty to know its harbour and the probable effects of a change of weather (*Caledonia Co. v. East London Harbour Board*, 23 S.C. at 554-5, [1908] A.C. 271 (P.C.)).

Shipmasters must provide proper gangways from the wharves to their ships (section 49 of the Harbour Regulations). An ordinary building ladder without any side-rails or supports whatever was, in *R. v. Evans*, 1946 P.H., H. 18 (N), deemed to be sufficient notwithstanding the fact that (as in that case) the master well knew that some of the sailors were wont to return to the ship in a drunken state. But now the regulations have been amended to compel safety nets to be provided in addition to a safe gangway. Reg. 49 of Govt. Notice No. 2241 of 21st October, 1949, reads as follows:

The Master of every ship, whether alongside any wharf, jetty, or quay, or outside another ship, or lying at buoys, or at anchor, must provide a safe and proper gangway so arranged as to admit of free and safe passage to or from the deck of the ship, also a good and sufficient safety net properly placed under the gangway. Such

gangway must be well and sufficiently lighted and a watchman shall be kept in attendance at the gangway at night on board all ships in a harbour. A lifebuoy with a line attached thereto shall be placed near each gangway and kept ready for immediate use. When lighters are being worked alongside a ship at an outer anchorage the ship's side shall be kept clear of all obstructions, the gangway ladder being lowered only as and when required.

Compare *Norman v. G.W. Railway Co.* [1915] 1 K.B. 584 (*ante*, p. 202).

SPORTSGROUNDS

There appear to be no South African cases where the owners of, or convenors of events in, grounds wherein sporting activities take place have been found guilty of *culpa* for damages suffered by spectators, the general rule being that the latter must expect a certain degree of risk on the basis of *volenti non fit injuria*, provided, of course, that the proprietors have taken reasonable precautions (*Hall v. Brooklands Auto Racing Club* [1933] 1 K.B. 205; *Murray v. Harringay Arena, Ltd.* [1951] 2 All E.R. 320 (C.A.); *Wooldridge v. Sumner* [1962] 2 All E.R. 978, and see *ante* at p. 56). Nor would a person standing outside a cricket ground be entitled to succeed upon the extremely unlikely event of being injured by a cricket-ball struck from within the ground by a batsman (*Bolton and others v. Stone* [1951] 1 All E.R. 1078 (H.L.)). Per Oakesley L.J. at 1084:

'There are many footpaths and highways adjacent to cricket grounds and golf courses on to which cricket and golf balls are occasionally driven, but such risks are habitually treated both by the owners and committees of such cricket and golf courses, and by pedestrians who use the adjacent footpaths and highways, as negligible and it is not in my opinion, actionable negligence not to take precautions to avoid such risks.'

2. THINGS THROWN INTO, OR SUSPENDED OVER, STREETS

In Roman law the praetor's edict established two anomalous remedies in respect of things thrown or poured into public streets (*de effusis aut dejectis*) and things placed or suspended over public streets (*de positis aut suspensis*). The actions lay against the occupier (*habitor*). It was not necessary to establish *culpa* in him, or to point to the actual wrongdoer, the liability being vicarious, and, though the underlying idea was *culpa* (*habitor suam, suorumque, culpam praestare debet*, Dig. 9.3.6.2), the mere fact that the thing was thrown out, or dangerously suspended, was probably sufficient. The actions were both *populares*; but whereas the former (*de effusis aut dejectis*) was intended to compensate (in double) for damage actually done, the latter (*de positis aut suspensis*) was for the recovery of a money penalty even before any damage had accrued.

In Roman-Dutch law, the popular action is regarded as obsolete; but an action lay at the hands of the person suffering damage, or his dependants if he was killed, in respect of both things thrown or poured, and in respect of things suspended which fell (Groen., *ad Inst.* 4.5.1.2). For a full review of the authorities see Hunt in (1963) 80 *S.A.L.J.* 273.

The scope of the remedy is set out by Wessels C.J. in *Colman v. Dunbar*, 1933 A.D. at 159–60, and by Innes C.J. in *Transvaal & Rhodesian Estates, Ltd. v. Golding*, 1917 A.D. at 28. In the former case, full authorities will be found cited in the argument (at 143). The *actio de positis vel suspensis* is applicable only in respect of things suspended or so placed on a building

that it projects over a public highway, and the basis of liability rests on the risk of its falling or its actually falling (*Bowden v. Rudman*, 1964 (4) S.A. 686 (N) at 691-2). It cannot therefore apply in respect of a gate left open across a footpath or a sidewalk (*ibid.*). In the case of things **thrown out**, the liability is in effect absolute and negligence is immaterial. The facts will usually raise the inference of negligence (cf. the English case of *Byrne v. Boadle*, 2 H. & C. 722, barrel falling from warehouse). In the case of things suspended over streets, however, it will be a defence that the thing was not dangerously attached or hoisted, which in effect means that *vis major*, or the act of a third party, will be a defence; and perhaps inevitable accident, i.e. no negligence.

The liability is in the **occupier** *stricto sensu*, i.e. the person actually living in the building (*Colman v. Dunbar*, 1933 A.D. at 150), and does not apply only to the builder. It is very doubtful whether it applies to a building occupied by many people such as an hotel (*ibid.*). Where the building is separable into parts, liability is in the occupier of the part where the thing emanated (Voet 9.3.1). The action lies in respect of places *quo vulgo inter fit*, not necessarily in towns or villages (Dig. 9.3.6 pr.), and is not confined to roads or streets or even to public places (Dig. 9.3.1.2). Actually there is no obligation upon the injured party to prove negligence on the part of the occupier, nor is it necessary for him to establish who was the particular culprit, for the whole basis of the action is occupation and not *culpa*. This rule of law imposes no great hardship for, as was pointed out in *Colman v. Dunbar* (*supra*) at 159, the occupier, in his turn, has a remedy against the person actually guilty of the act (Dig. 9.3.5.4).

In *Wilson v. Birt (Pty.) Ltd.*, 1963 (2) S.A. 508 (D), a falling object not suspended or thrown out was treated on the basis of negligence. Here it was held that the dismantling of a scaffold is an intrinsically dangerous occupation demanding a higher standard of care than a less dangerous pursuit and, consequently, a person injured by a falling pole was entitled to damages. (See, also, Van der Walt in (1964) 81 S.A.L.J. 504.)

For an analogous case of depositing refuse see *Moore v. De Klerk*, 1950 (4) S.A. 470 (T), where appellant had been conveying pig food along a busy road in a trailer. Owing to a breakdown the trailer tipped backwards and deposited a quantity of the food on the road. Appellant, realizing that the presence of the food on the road constituted a danger to traffic, left the scene in order to obtain the assistance of the police to warn traffic approaching the spot. While appellant was away a motor-car skidded on the slippery surface and was damaged. Held, that the appellant was liable for negligence.

3. DANGEROUS CONDITION NOT CREATED BY OCCUPIER

If there exists, on property, a dangerous condition of which the occupier has knowledge, but which he has not himself either created or permitted, is he under any active duty to take precautions in respect of it? This question raises considerable theoretical difficulty. Liability under the *lex Aquilia* (as was stated *ante*, p. 11) depends on some act of commission; and where there has been no act of commission, there is no duty to be active and no liability for failing to take precautions. It is therefore difficult to see how, in an action based on negligence, an occupier can be made

responsible for dangers on his property which he has not himself caused. On the other hand, it seems an impossible attitude for the law to adopt, that a man may stand by and see others injured by some such dangerous condition as a ruinous building or an unguarded excavation on his property, without incurring any liability (see *Cape Town Municipality v. Paine*, 1923 A.D. 207).

CAUTIO DE DAMNO INFECTO

In Roman law, the position was to some extent covered by the operation of the *cautio de damno infecto*. This applied to apprehended damage. If a man had reason to apprehend damage to his property from some object upon his neighbour's land (e.g. a ruinous building or a tree), he could call upon him to give security (or to remove the danger). If the damage then occurred, the security was, presumably, forfeited to the extent of the damage. But if he failed to exact security, he had no action for the damage unless the neighbour wished to remove the materials, in which case he must pay the damage (see Dig. 39.2.7.2–8 *et ibid.* Gothofredus; Voet 39.2.14). This curious rule was based upon the archaic view that an inanimate object doing damage was itself at fault (cf. the English deodand); consequently the ordinary noxal rule was applied—the owner was not liable if he was prepared to abandon his rights to the threatening object. The praetor therefore introduced the *cautio*, to give a remedy to a vigilant owner who otherwise might suffer loss without recompense. The *cautio* lay only where there was no other remedy (Voet 39.2.1; Van Leeuwen, *Cens. For.*, 1.5.31.5).

In Roman-Dutch law, the principle of the *cautio* was preserved though the exaction of security was no longer necessary; the serving of a *protestatio* took its place, the owner being then obliged to remove the debris and make good the damage, or surrender the materials (Voet 39.2.15; Groen., *ad Dig.* 39.2). Whether the *protestatio* was a matter of public record does not appear; presumably it was.

In South Africa any formal *protestatio* is unknown. Solomon J. in *Burnett & Taylor v. De Beers*, 8 H.C.G. 5, refers to the duty of an owner in case of *damnum infectum*, to give notice to his neighbour, but treats the case as one of *volenti non fit injuria*; while in *Kaiser v. Schenker*, 21 S.C. 317, Buchanan J. refers to 'a noxal action', having in mind apparently the rule as to damage by inanimate objects above set out. In that case a building was partially burnt and subsequently, under pressure of wind, the gable fell upon neighbouring property. There was some evidence that the danger had been increased by the acts of defendant's servants. Defendant was held liable for not taking precautions to make the gable safe. In *Transvaal & Rhodesian Estates, Ltd. v. Golding*, 1917 A.D. at 24, certain inconclusive authority was quoted for the proposition that an owner who knows of a dangerous situation owes a duty, based upon nuisance (compare *Bingham's case*, 1934 W.L.D. 180, discussed below).

DUTY IN RESPECT OF NEIGHBOURS

It seems improbable that the *cautio*, or *protestatio*, would be held to subsist in South Africa today. But the courts would probably accept the underlying principle, namely, that where an occupier has knowledge of a

dangerous condition, either because protest is made to him or from his own observation, he will lie under a duty to his neighbour to take reasonable steps to prevent damage to the latter. What are reasonable steps, and from what circumstances knowledge is to be inferred, will be matters of fact to be decided by general principle. Knowledge here, it is submitted, means **actual knowledge**, or perhaps means knowledge of the most patent kind. The duty, no doubt, does not fall within the principle of the *lex Aquilia*, belonging rather to the domain of **nuisance**. In *Cape Town Council v. Benning*, 1917 A.D. 315, an analogous question in connection with flooding by altering the natural drainage of land is discussed; but here neither knowledge nor the means of knowledge was established; this case is considered *post* (p. 226). Where the dangerous condition is caused by the act of the occupier himself, or of someone on his behalf, there is no difficulty (as in *Bingham v. Johannesburg City Council*, 1934 W.L.D. 180, where roots of trees were encroaching into plaintiff's soil); and no doubt the rule is the same where it was caused by a predecessor in title.

In English law, too, the point is unsettled, in respect of private nuisances as distinguished from nuisances affecting public ways or places—see the authorities cited in Halsbury, vol. 24, p. 85, note (i), especially the dissenting judgment of Scrutton L.J. in *Job Edwards, Ltd. v. Birmingham Navigations* [1924] 1 K.B. 341.

The duty, if it exists, will probably be restricted to *continuing dangers*, arising from some continuing state of affairs; because such is the nature of a nuisance (*Salmond on Torts*, 7th ed., p. 258; McKerron, p. 215). It will not, for example, cover a fire lighted by strangers (*Van Reenen v. Glenlily V.M. Board*, 1936 C.P.D. 315). Such a case falls to be decided by the principles of the *lex Aquilia*.

If the neighbour knows of the dangerous condition and stands by without protest, he may lose his right; but then surely the ordinary rules of the defence of *volenti non fit injuria* must be applied (for which see *ante*, p. 55). *Burnett & Taylor v. De Beers*, 8 H.C.G. 5, in which Solomon J. held that a claimworker who failed to protest when the claim next to his was not 'dug down', in conformity with the special rules evolved for the Kimberley mines, lost his right to damages, must be regarded as a very special case.

An interesting point arose in *Holte v. Roberts*, 1946 N.P.D. 178, where A claimed damages from H on the ground that the latter had left locust poison in a shed on the farm prior to selling the place to R. Here the Court ruled that, as the bags were distinctly marked 'poison', R had only himself to blame for the deaths of the cows concerned.

DUTY TO THOSE COMING UPON PROPERTY

Where persons come upon property by invitation, there seems no difficulty in requiring the occupier to take active steps for their safety, even in respect of conditions not created by him—the duty springs from the invitation (*ante*, p. 196). Where they come as mere licensees, or even as trespassers, but to his knowledge, the question is more difficult. The *cautio* would not apply to such cases. And in *Golding's case* (*supra*) Innes C.J. was disinclined to apply the doctrine of nuisance to a condition on private property, unless possibly it was in close proximity to a public

road. But it is submitted that here too the courts would hold that there is a duty to *warn*, not merely in respect of dangers created by the occupier, but also in respect of dangers created by others, or arising naturally, but known to him. Here, too, however, the duty would probably be restricted to *continuing dangers*.

4. THINGS ESCAPING FROM PROPERTY

In English law there exists a special rule of liability in respect of things collected, created or brought upon property by the occupier for his own purposes, which have a tendency to escape beyond his control and which, if they escape, are likely to do injury to his neighbours (Halsbury, vol. 28, sec. 194). The liability is absolute in the sense that it is unnecessary for the plaintiff to establish negligence if the claim is based on nuisance known to the defendant (see *Van der Merwe v. Carnarvon Municipality*, 1948 (3) S.A. 613 (C)). But it is a defence that the escape was caused by act of God or *vis major*, by the fault of the plaintiff, or by the independent act of a stranger; that the thing was collected in the exercise of statutory powers without negligence, or at the request of the plaintiff or by contractual or prescriptive or servitudinal right against him; or that it was collected in the course of a natural and ordinary use of the property (ibid., and cf. *North-Western Utilities* case [1936] A.C. 108 at 119).

RYLANDS V. FLETCHER

The rule in its modern form is a piece of judicial legislation embodied in the decision in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330, and constitutes a generalization from such recognized grounds of **absolute liability** as that in respect of cattle trespass; it is treated as a branch of the law of nuisance (see the authorities cited in *Bingham's* case, 1934 W.L.D. at 185-6); in spite of certain expressions of judicial dislike it has shown remarkable vitality and has been held to cover a wide range of cases (see Halsbury, vol. 28, sec. 195).

The strict limits of the doctrine have been recently outlined by the House of Lords in *Read v. J. Lyons & Co.* [1946] 2 All E.R. 471 (H.L.), where it was ruled that there is no absolute liability on the owner of an ordnance factory for the bursting of a shell and that the invitee had, therefore, to prove negligence.

In *Eastern Telegraph Co. v. Capetown Tramways* [1902] A.C. 381, reported 11 C.T.R. 589, the Privy Council took the view that the rule in *Rylands v. Fletcher* (*supra*) is 'not inconsistent with the principles of the Roman law', and were therefore prepared to regard it as part of the law of South Africa; but held that in the particular case it had no application. In any case the remark by Lord Robertson was *obiter dicta* and not essential to the decision of that case. In the lower court (see 17 S.C. at 111), De Villiers C.J. was not prepared to accept the rule 'in its entirety' as part of our law; holding that in the case of the escape of such things as electricity, negligence must be shown.

The rule has never been applied in South Africa. It has been consistently doubted (see, e.g., *Parker v. Reed*, 21 S.C. 496; moreover the principle has been denied in *Jurgenson v. Cape Town Municipality*, 1923 C.P.D. 351; *Goosen v. Reeders*, 1926 T.P.D. 436, and *Van Reenen v. Glenlily*

V.M.B., 1936 C.P.D. 315, and expressly repudiated in *Union Government v. Sykes*, 1913 A.D. 156 at 161, and *Botes v. Potchefstroom Municipality*, 1941 T.P.D. 149 at 152. It certainly seems curious that the doctrines of one body of law should be incorporated into another body of law because they are 'not inconsistent' with it. Scottish law apparently accepts the rule as properly expressing its own doctrine (see 11 C.T.R. at 592). On the other hand, in matters of nuisance our law does for the most part accept English decisions as correct for South Africa; and *Rylands v. Fletcher* may now be regarded as a decision on **nuisance** only.

Our courts have, however, held that, when a person is engaged in an **intrinsically dangerous activity** or pursuit, a **higher standard** of care and diligence is required of him than if he were engaged in a less dangerous pursuit (*Durban C.C. v. S.A. Board Mills, Ltd.*, 1961 (3) S.A. 397 (A.D.) at 405; *Wilson v. Birt (Pty.) Ltd.*, 1963 (2) S.A. 508 (D) at 511). As was pointed out by Searle J. in *Van der Merwe v. Zak River Estates*, 1913 C.P.D. at 1074, even if liability in our law is based on negligence, the result in many cases would be the same as would be reached by an English court. Because the degree of care required in respect of dangerous things collected upon land will be a high one, the fact that the thing has escaped will normally raise an inference of negligence. The person responsible for the collection will, in most cases, be liable for the default even of an independent contractor, the operation being 'dangerous per se'. *Vis major* or the act of a stranger will, in any event, be a defence.

The escape of water is dealt with in a special chapter (*post*, p. 224). (As to the case of fire, see *post*, p. 232.)

ELECTRICITY

In *Botes v. Potchefstroom Municipality & De Lew*, 1941 T.P.D. 149, plaintiff claimed damages for the death of her son who was employed by the second defendant in dismantling an amusement park. During the course of his work he came into contact with a live wire and was killed. The second defendant settled and the case proceeded against the first defendant. The plaintiff claimed on three grounds: Firstly on the ground of absolute liability, but the Court held that *Rylands v. Fletcher* (*supra*) was inconsistent with our law; Secondly that the defendant was negligent in failing to cause an inspection to be made of second defendant's wiring system before permitting current to be transmitted for use, but the Court held that an intolerable onus would thus be placed upon a generator of electricity were it to concede this contention. Per Malan J.:

'... if a person supplies a dangerous article to another and it passes out of his control and under sole control of that other, and the latter thereupon negligently uses it in such a manner as to cause injury to a third party, the supplier will not be liable in damages to such third party unless he placed the dangerous article in the possession of a person who was obviously *unskilled* or *unable to control it*, or unable or unlikely to use precautionary measures.'

Thirdly that plaintiff's claim based on section 49 of the Electricity Act, No. 42 of 1922, but the Court held that the claim must fail, for to give a literal meaning to the words of the section would be to place the generator of electricity in the position of an **insurer** (at 152).

Section 50 of Act No. 40 of 1958 now provides:

- (1) 'In any proceedings against an undertaker arising out of damage or injury caused by induction or electrolysis or otherwise by means of electricity generated or transmitted by or escaping from the plant or machinery of any undertaker, it shall not be necessary for the plaintiff to prove that the damage or injury was caused by the negligence of the defendant and damages may be recovered notwithstanding the absence of such proof.'
- (2) 'In any such proceedings it shall be a defence that the damage or injury was due to the wilful act or to the negligence of the person injured or of some person not in the employ of the defendant or of some person operating the plant or machinery of the defendant without his consent.'

It would, therefore, be unjust to make an occupier liable in damages for the act of a trespasser who entered premises and cut an electric cable (which had been properly insulated) with a pair of pliers, thereby causing an injury to himself (*Walder v. Hammersmith Borough* [1944] 1 All E.R. 490) (K.B.)). Where a member of a fire-brigade had, when attempting to put out a fire in a house which had faulty electricity wiring, and had, by reason of such fault, been electrocuted it was held that his widow was entitled to succeed in her claim for damages against a defendant who should have been aware of the defect (*Hartley v. Mayoh & Co.* [1953] 2 All E.R. 525, [1954] 1 All E.R. 375 (C.A.)).

In *Eastern Telegraph Co. v. Cape Town Tramways* [1902] A.C. 381 (P.C.), the electricity which operated defendant's trams interfered with a cable running under the streets and serving plaintiff's telegraph; the electricity was treated as 'escaping' from the uninsulated rails. The Cape Supreme Court held that there was no negligence in the defendant's operations; the Privy Council ruled that, as plaintiff was conducting a special operation, not an ordinary use of land, which was peculiarly subject to interference, it could not claim protection under the special rule in *Rylands v. Fletcher*, and had not established negligence. In *Kelly v. Johannesburg Municipality*, 1906 T.H. 245, where an electrical transformer had been sufficiently guarded but by the act of some stranger had become dangerously uncovered, Bristowe J. remarked that a duty was owed to safeguard 'this powerful and dangerous current', but that defendants were not insurers, and were not liable for an accident not caused by their negligence. In *Kift v. Cape Town Municipality*, 17 S.C. 465, a wire which carried no current was negligently allowed to fall upon a charged wire, and the municipality was held liable. In *Jurgenson v. Cape Town Municipality*, 1923 C.P.D. 351, however, where a wire was broken by the fall of a tree, it was ruled that there was no liability. In all these cases the result would be the same whether liability was based on negligence or on *Rylands v. Fletcher*.

Duty to Warn

Whatever moral obligation there may be upon a person who observes a stranger approaching in dangerous proximity to electrified wires (as where a power line has been knocked down by the action of a fallen tree or by other means), there would be no legal duty upon him to warn such stranger of his danger. The position would, however, be otherwise where there exists some particular legal relationship between the parties as, for example, that of master and servant or of co-workers. Accordingly it was held in *S. v. Russell*, 1967 (3) S.A. 739 (N), that the accused, having been

warned that the electric current would be switched on at a certain time, was under a legal duty to impart this information to his other assistants working under him and that his failure to do so constituted negligence on his part, to the extent of justifying his conviction for culpable homicide. Similarly in *R. v. Puttock*, 1967 R.L.R. 186 (A.D.), where the appellant had installed some electrified wires around his pigsties, for the purpose of foiling attempts to injure his stock, it was held that his verbal warning to his servant of the danger was not enough and that he should, in the circumstances, also have taken extra care in installing an electric bulb to warn persons whether the electric power was on or not. Where, therefore, his servant had failed to wait for him, as instructed, but had approached the sties and, in contacting the said wires, been killed as a consequence, it was ruled that the appellant had rightly been convicted of culpable homicide.

5. TREES

It is the duty of a municipality to prevent trees from becoming a source of danger (*Pretoria C.C. v. Wolhuter*, 1930 T.P.D. 671 at 764). It will therefore be responsible for damage occasioned by its failure to fulfil this duty (*Cradock Municipality v. Philips*, 1938 E.D.L. 382). Per Lansdown J.P.:

‘A standing tree might become dangerous not only by an inherent defect such as a rot in its roots, trunk or branches, but by the shallowness or nature of the soil in which it is rooted, or its declination from the perpendicular, or its height or weight or some similar fact. A quality of danger in a tree may therefore be unaccompanied by a defect inherent in the tree.’

The fact that a tree is blown down by wind, thereby causing damage, is not sufficient in itself to ground an action, since the liability is not absolute. Accordingly, proof, that the manifestation of disease or decay had reached the stage when need for further investigation by the municipality or land-owner became apparent, is necessary (*Kruger v. King William's Town Municipality*, 1959 (4) S.A. 547 (E)). In this regard the decision in *Caminer v. London & Northern Trust* [1950] 2 All E.R. 486, [1956] 1 A.C. 88 (H.L.) is instructive. Here a tree, affected by elm butt-rot, had fallen on to a passing car, and it was ruled by Lord Normand that the standard of care ‘postulates some degree of knowledge short of the knowledge possessed by scientific arboriculturists but greater than the knowledge possessed by the ordinary urban observer of trees or even of their countrymen not practically concerned with their care’ (at 493F). Lord Reid, on the other hand, thought that the standard of care was that of ‘a reasonable and careful man without expert knowledge but accustomed to dealing with his trees and having a countryman’s general knowledge about them’ (at 499D).

Roots and leaves

In *Bingham v. Johannesburg City Council*, 1934 W.L.D. 180, the municipality was held liable for the spread into plaintiff’s property of roots from trees planted by it in the exercise of statutory powers; the kind of tree selected being unusually liable to cause this trouble. Liability was based on nuisance. In *Kirsch v. Pincus*, 1927 T.P.D. 199, defendant, not by way of enjoyment of his property but in order to annoy and injure plaintiff,

planted trees on his boundary so that they dropped leaves on plaintiff's malt-drying floors. Held, that defendant was liable as for nuisance.

6. SMOKE

An invasion of one's rights may be effected by the presence of smoke emanating from the land of one's neighbour. This topic is more often dealt with under the heading of Nuisances, but can also be considered under the caption of Negligence (*Gibbons v. S.A.R.*, 1933 C.P.D. at 523). In *Holling v. Yorkshire Traction Co., Ltd.* [1948] 2 All E.R. 662 the owner of coke ovens permitted smoke to be emitted in clouds of sufficient density to obscure the view of users of a roadway with the result that two motorists collided with each other. Held, he was guilty of negligence in not posting a man at each end of the area affected to warn approaching vehicles as soon as the discharge of smoke was imminent. Where however, a person burns his veld grass and causes smoke to drift across a roadway, thereby obscuring the view of motorists and other road-users thereon, he is not liable in negligence since the danger, inherent in the smoke, is manifest to everyone and there is no duty upon him to warn travellers about it (*Fevrier v. Henderson*, 1963 (4) S.A. 491 (N) at 496). Much would depend upon the speed and look-out of the motorist as to whether he, on his part, would be guilty of negligence (*ibid.*, at 497). *Holling's* case (*supra*) criticized, since the smoke constituted a clear warning of danger.

7. FACTORIES

Owing to the complexity and diversity of conditions and circumstances prevailing in factories the legislature has, under the powers conceded under the Factories, Machinery and Building Work Act, No. 22 of 1941, empowered the Minister to issue regulations governing the safety, health and welfare of employees covered by the provisions of the Act. Regulations have been promulgated which prescribe the degree of care demanded of the owners of factories and occupiers of buildings in such matters, *inter alia*, as protective clothing, fire precautions, gases, storage of inflammable material, precautions against flooding, safety devices on machinery, conditions of floors (that they should be level, free from loose material and not to be allowed to become slippery). The fencing of dangerous places and erection of guards on machinery, circular saws, etc., the protection of employees and even trespassers from electrical installations, and also the safety of persons using elevators. As submitted above (pp. 5-6) an infringement of these regulations, besides being a punishable criminal offence, would, in most cases, be regarded as a good standard of care demandable from the defendant concerned.

Where, however, injury is suffered as a result of conditions not governed by the regulations, the party is left to his ordinary civil remedy and will have to establish clearly the negligence of the employer concerned. Such a position arose in *Van Heerden v. S.A. Pulp & Paper Industries, Ltd.*, 1946 A.D. 382, where an employee, whose health had been adversely affected by the inhalation of chlorine gas in his employer's factory, sued the latter for damages, but failed to recover. In this case it was conceded that the defendant was under a duty to provide reasonable measures and take reasonable steps for the protection of the plaintiff in the course of his

employment, the difficulty herein being to determine what were reasonable steps or precautions. Certainly the defendant is not an insurer of the plaintiff, and Schreiner J.A. held:

- (a) That he was not prepared to agree that the presence in and about the works of free chlorine, even in considerable concentration (*sed quare*) in itself shows negligence on the part of any person at all.
- (b) That what is reasonable in the case of one particular industrial plant will depend on the experience of the industrial world in regard to such plant and the circumstances surrounding its erection and operation, and whether it is the first of its kind in the country or not.
- (c) Modern legal systems recognize the need to provide adequate protection for the health of workmen employed in industrial production, but for such protection to be complete as is considered socially desirable, legislation is often necessary. The common law of negligence cannot be intended to require of employers all the precautionary measures that, upon an exhaustive investigation of all the manifold factors involved, might be found to be properly imposable upon them.
- (d) Negligence in this regard is all a question of degree. Only when a stage of obviousness is reached—when it is clear that the risks of real danger to health of the workmen could, and should, have been foreseen and obviated—can the court affirm that the conduct of the employer has been unreasonable and negligent.
- (e) The fact that more satisfactory machinery is in operation elsewhere and that improvements can be suggested, or could certainly be made, do not by themselves prove that the presence at any time of imperfections is due to the employer's negligence. What applies to the physical condition of the plant applies also to the methods of *control* and *organization* whereby undue risks may be avoided. Trial and error must be accorded a fair measure of recognition as a legitimate method of progress when one is passing judgment on the reasonableness of an employer's conduct; and the fact that investigators have discovered better and safer ways of managing a factory of this kind does not necessarily mean that the employer's earlier methods were negligent.

Where a gas cylinder was placed in a ship and later caused an explosion, and where it was found that as it was known that the gas might escape if the valve were not properly secured, and as the cylinder was left in a position where it might have to be moved without there being any warning of danger moving it nor instructions as to how it should be moved, it was ruled that the defendant was negligent (*Beckett v. Newalls Insulation Co.* [1953] 1 All E.R. 250 (C.A.)). This is not a decision founded on *Rylands v. Fletcher* (*supra*) at 250, but on the principle that 'the greater the danger the greater the care required' (*ibid.*, at 254-5).

8. RAILWAY PREMISES

Unexpected dangers on railway premises can also attract liability to the Administration (*Stoltz v. S.A.R. & H.*, 1950 (3) S.A. 592 (T)). In this case an engine-driver, upon hearing an unusual noise, put his head out in

order to ascertain where the noise was coming from. In so doing his head collided with a mast on the side of the track, which mast was found by the Court to have been leaning over towards the track instead of away from it by more than a foot. This was deemed to have been a danger which was patent to everyone and, since it would not have injured the head of plaintiff's husband had it been erect it was found that the defendant was liable in negligence.

CHAPTER XI

WATER

SUMMARY

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LIABILITY FOR FLOODING BY ALTERATION OF NATURAL DRAINAGE

ROMAN LAW

In Roman law, liability for flooding a neighbour's land by rain-water was dealt with by an independent and peculiar action of great antiquity, the *actio pluviae arcendae*; for which see Voet 39.3 (translated with notes by Krause), and Dig. 39.3. The scope of the action is set out by Solomon J.A. in *Cape Town Municipality v. Benning*, 1917 A.D. 315 at 320-1, and is to the effect that action was not primarily for damages but for an abatement of the mischief (i.e. the removal of the work which caused the flooding). It lay in respect of flooding by rain-water, against the owner or usufructuary on whose land a work had been constructed which altered the natural flow of the water, and threw it upon a neighbour's land either in great volume, or in greater concentration, or in accelerated flow. The action applied only to rural property—in respect of urban tenements the proper remedy was the negatory action of servitude.

If the owner had himself constructed the work or authorized it, or allowed it to be constructed when he could have prevented it, he must remove it at his own expense. If it was done without his knowledge or before he came to the land—*praestat tantum patientiam*—he need only permit the neighbour to come upon the land and abate the nuisance at his own expense. The only damage recoverable in this action was that arising after action begun (*litis contestatio*). The action did not lie where the work was done *agri colendi causa*. The *Digest* (39.3.1.1-9, 1.15, 24 pr. et seq.) gives examples of works which are and which are not *agri colendi causa*; no doubt the underlying principle is the 'reasonable and proper cultivation of one's property' (per Innes C.J. in *Johannesburg Municipality v. African Realty Trust, Ltd.*, 1927 A.D. 163 at 177) according to the recognized farming practice of the country.

For damage suffered before *litis contestatio*—i.e. for damages as distinguished from abatement of the nuisance—a different remedy was available, the *interdict quod vi aut clam* (Dig. 39.1.1.2; 39.3.5; 39.3.14.3). Such knowledge as we possess of this interdict is derived from Dig. 43.24, which unfortunately gives no example of its application to flooding by water. It lay whenever anything was done upon land ‘by force or secretly’, whereby another was injured in his proprietary rights. ‘By force’ was interpreted to include in spite of prohibition; ‘secretly’ to include without obtaining consent to an act which, it might have been anticipated, would be objected to. Apparently this relates to the doctrine of *operis novi nuntiatio*, by which a neighbour could give notice of objection to a new work which he feared might cause him damage. The *opus clam factum* must necessarily have been the construction of the work, not the flooding.

The interdict was prescribed in an *annus utilis*; but, on good cause shown, the bar might be removed. It lay primarily against the person who constructed the work, or authorized it, or allowed it when he could have prevented it. It lay also against the present occupier. But whereas the occupier who did the work must remove it and pay the damage, and the doer who no longer occupied must pay the damage, the mere occupier need only permit removal—as in the *actio, praestat tantum patientiam*.

The interdict did not lie where, by consent or otherwise, there was a right as against the plaintiff to do the work; or where there was just cause, e.g. public health or prevention of fire; or where it was done *agri colendi causa*.

Ground of liability

As the *actio pluviae arcendae* lay for the abatement of a nuisance; negligence was irrelevant; the action was not delictual, and liability arose, as Voet says, *proprio quodam jure ex alia quadam causarum figura*—from a specific and anomalous remedy. The *interdict*, however, was in this form an action for damages and the basis thereof was *culpa* (Dig. 43.24.15.11, *culpam quoque in hoc interdicto venire erit probandum*); except where the mere possessor was required to permit abatement. But whether *culpa* here meant negligence, or *culpa* in the wide sense, i.e. the doing of something forbidden, it is difficult to say; probably the latter.

Summary

To summarize: By the *actio pluviae arcendae*, an owner of land could be called on to remove a work which he had himself constructed, or allowed, which altered the flow of rain-water on to his neighbour's land. But if he had neither constructed nor allowed it, he need merely permit removal. By the interdict, the person who actually constructed the work, whether still in possession or not, could be made liable in damages.

To either action it was a **defence** (a) that a right existed as against the plaintiff to do the work, (b) that in fact the natural drainage had not been interfered with, (c) that the work was done *agri colendi causa*, ‘in the course of reasonable and proper cultivation of the land’ (per Innes C.J. in *Johannesburg Municipality v. African Realty Trust, Ltd.*, 1927 A.D. 163 at 177). Under (a) would nowadays be included, of course, statutory authority exercised without negligence (see *ante*, pp. 49–50).

SOUTH AFRICAN LAW

The Roman law was accepted in Holland (see Voet 39.3), and it forms the basis for our law in South Africa. The liability for the alteration of natural drainage is in effect treated as matter of nuisance; 'it arises quite independently of negligence' (per Solomon J.A. in *Cape Town Municipality v. Benning*, 1917 A.D. 315 at 319), the requirement of *culpa*, if it exists, being satisfied by the doctrine that, to do an act which results in altering the natural drainage, is in itself *culpa*, as being forbidden. The liability attaches to flooding both in town and country, the distinction of remedy being nowadays unimportant. But whereas the defence of reasonable and proper cultivation is easily applicable to country property (see *Labuschagne v. Steyn*, 1929 O.P.D. 20), it is not clear that this defence, or the analogous one of ordinary and proper use for urban purposes, will apply to urban tenements (see per Innes C.J. in *African Realty Trust* case (*supra*) at 177).

Differing from Roman law, the liability attaches to the **person actually responsible** for the flooding and is not merely one against the owner *qua* owner (*Cape Town Municipality v. Benning*, 1917 A.D. 315). The onus in each case lies upon the plaintiff to prove that by the adoption of certain precautions, reasonably practicable, the concentration in volume and velocity of storm-water could have been avoided (*Van Deventer v. Sterkstroom Municipality*, 1943 E.D.L. (J/C 185/43)). Where, however, the plaintiff's land was subject to a natural servitude to receive water flowing from the defendant's land, and he fails to prove any damages by the diversion of water from other than the dominant tenement, his action will fail (*De Villiers v. Galloway*, 1943 A.D. 439). But to build a dam and thereby cause water to flow back on to plaintiff's land, will be actionable (*Ackerman v. Fry*, 1951 (1) S.A. 390 (T)). Accordingly, unless the defendant has altered the natural flow of water on to plaintiff's land, i.e. in a more concentrated or faster volume, his claim to compensation will be declined (*Van Schalkwyk v. Van der Wath*, 1963 (3) S.A. 636 (A.D.)). See also *Thormahlen v. Gouws*, 1956 (4) S.A. 430 (A.D.) at 436, and *Benoni Town Council v. Meyer and others*, 1959 (3) S.A. 97 (W), for the *actio pluviae arcendae*. The failure of a dominant servitude holder to exercise his rights *civiliter modo* in regard to water can give rise to an action for negligence (*Kakamas Bestuurraad v. Louw*, 1960 (2) S.A. 202 (A.D.)).

For a case in which damages were awarded for flooding of a lower apartment by the negligence of the servant of the upper occupier in allowing tea-leaves to block the waste pipe see *Zwarts v. Wailer*, 1950 P.H., J. 8 (E).

LIABILITY FOR ACT OF STRANGER

A question discussed in *Benning's* case, *supra*, is the liability of an occupier in respect of flooding not caused by his own acts. If he authorized the acts, or knew of and permitted them, he will probably be liable as though he had himself performed them. If, however, he was not aware of such acts, he will not be liable. Even if he did know that they were being done, he will probably not be liable unless he either knew, or should have known, that they would **cause flooding** (*ibid.*, at 325); unless, of course, they were done for his **benefit**. Two questions, however, remain open: (a) If an occupier comes to know of an act which may cause flooding,

after it has been completed, does he owe any duty to take precautions, and is he liable in damages if he does not? (A similar question in respect of dangerous agencies, other than water, is discussed *ante* at p. 217); and (b), is he liable in respect of acts of which he had no actual knowledge but of which *should* have had knowledge?

The special remedies based on the *actio* and the *interdict* apply as between **neighbouring occupiers**, in respect of the flow of water from one property to another. Where the plaintiff is not such an occupier, his right of action will no doubt be based on the *lex Aquilia*, and require proof of negligence; as in *Tilbrooke v. Port Elizabeth Municipality*, 4 Buch. A.C. 37, where the plaintiff complained, but did not establish, that by the negligent acts of the municipality in blocking the exit of a lagoon, his goods, stored in a third party's warehouse, were damaged by flood-water.

EXERCISE OF STATUTORY POWERS

The general rule is that, apart from servitude or contract or the limited privilege of the upper proprietor of increasing the flow on to his neighbour's property as a result of the proper cultivation of his land, no farmer is entitled, by means of artificial works, to discharge on to his neighbour's property water which would not have flowed there naturally, or to concentrate or increase the natural flow to the detriment of his neighbour (*Labuschagne v. Steyn*, 1929 O.P.D. 20; *Breede River Irrigation Board v. Brink*, 1936 A.D. at 365 (see *ante*, pp. 49–50)).

To this rule there is the exception that where a statutory body is empowered by the legislature to perform the work of making dams or roads or canals and the like, and thereby interfere with the natural drainage of the land, the onus is first on the local authority to satisfy the Court that the legislature contemplated an interference with private rights. Thereafter the onus lies upon the plaintiff of proving that the statutory body could, by the adoption of certain precautions, reasonably practicable, have avoided the great concentration in volume and velocity of storm-water or its erosive effect (*Reddy v. Durban Corporation*, 1939 A.D. 293; *Bloemfontein Town Council v. Richter*, 1938 A.D. at 209; *New Heriot G.M. Co. v. Union Govt.*, 1916 A.D. 415; and *African Realty Trust* case, 1927 A.D. (*supra*)), i.e. he must establish a negligent exercise of the statutory right to alter the natural drainage of water (*Germiston C.C. v. Chubb & Sons Lock & Safe Co. (S.A.) (Pty.) Ltd.*, 1957 (1) S.A. 312 (A.D.)). Consequently, where the defendant, an irrigation board, constituted under Act No. 8 of 1877 (Cape), had, in the exercise of its powers under the Act, constructed an irrigation canal which, in its course, crossed a dry river-bed thereby interfering with the natural flow of the water in times of extraordinary flood, it was held that, as the cost of constructing the canal in such a way as not to interfere with the natural flow of the water would have been prohibitive—and as the board had acted within its statutory powers—the owner of the farm suffering damage as a result of such interference could succeed only upon proof that the board had been negligent either in the original construction of the canal or in subsequently not taking protective measures at the crossing (*Breede River Irrigation Board v. Brink* (*supra*)).

In the case of flooding by road-making operations by a municipality

or local authority in the exercise of statutory powers, the discharge of the initial onus by the local authority is in effect automatic. In deciding what measures are reasonably practicable to avoid injury to others in such a case regard must be had to the total requirements and recourses of the local authority, and not merely to the means of providing protection to an individual landowner (*Germiston C.C. v. Chubb & Sons Lock & Safe Co. (S.A.) (Pty.) Ltd. (supra)*). The position of any one plaintiff must be equated to the requirements of the whole area and the recourses available to all of them (*Germiston City Council case (supra)*).

In *Johannesburg Municipality v. African Realty Trust Co.*, 1927 A.D. 163, the plaintiff had claimed damages by reason of the fact that the volume and velocity of flood-water discharged on its land had been increased by the construction of certain drains made by the municipality. In the unanimous judgment of the Court the following principles were authoritatively stated: (a) Where permissive powers conferred by statute are expressed in general terms, and there is nothing in the statute to localize their operation and they do not necessarily involve an interference with private rights, the inference is that the legislature intended the powers to be exercised subject to the common-law rights of third persons; (b) if, however, the nature of the work authorized is such that it may interfere with private rights, then the person entrusted with the statutory authority is entitled to show that, under the circumstances of the case, it is impossible to carry out the work without such interference, in which case an inference that an infringement of private rights was sanctioned would be justified. This case was approved of and followed in *Reddy v. Durban Corporation*, 1939 A.D. at 299. (See also *Parker v. Union Govt.*, 1945 P.H., J. 11 (C).)

Whether a municipality is obliged to keep drains cleansed and unchoked was dealt with in *Cape Town Municipality v. S.A. Veneer & Plywood Co.*, 1939 C.P.D. 262. In this case it was resolved by the Court that neither under the common law nor under section 213 of Ord. 10 of 1912 was a liability placed upon the defendant to keep the drains so that they should work at full capacity, and, since there was no allegation that the municipality had, by a prior act, placed a greater burden on plaintiff's property, by causing it to receive more water than it would receive naturally, the exception should be allowed.

The mere fact, however, that a water main leaks raises no presumption of negligence on the part of the municipality for laying and maintaining the main. In order to be able to succeed the plaintiff must establish affirmatively negligence on the part of the municipality concerned (*Nederlandsche Bank v. Johannesburg Municipality*, 1910 W.L.D. 415; Dönges and Van Winsen, *Municipal Law*, pp. 495-7).

If one proprietor unlawfully permits water from his land to invade the land of another the latter is entitled to take immediate steps to divert the water to its original course, and for this purpose he may enter upon the other's land and there remove the obstructions which caused the diversion (*Hugo v. Page*, 1944 C.P.D. 119).

LIABILITY FOR FLOODING BY BURSTING OF DAMS

The special actions considered in the preceding section apply to flooding by rain-water. It is not clear that they would in terms apply to water

escaping from a dam or reservoir. The *Digest* defines *aqua pluvia* as water falling from the sky, whether it does damage by itself or when mixed with other water (39.3.1 pr.), and explains it as water which 'changes or increases the colour' (presumably of the standing or running water with which it mixes); this would cover the case of a dam bursting under pressure of rainfall but not otherwise.

The distinction, however, is a narrow one. In English law, the collection of water upon one's property, where it constitutes a non-natural user, falls within the rule of 'absolute' liability established by *Rylands v. Fletcher*. The rule, with its exceptions, is stated *ante* (p. 217), where its application to South African law is also considered. In view of the persuasive effect of this rule, it would appear that our courts would apply the effect of its principles, in relation to the **degree** of care required, to cases where water, having been collected upon land, escapes therefrom and does damage to neighbouring occupiers. In *Van der Merwe v. Zak River Estates*, 1913 C.P.D. 1053, Searle J. regards the *actio pluviae arcendae* as applying to dams (see at 1073), though the decision turns on negligence. It is submitted, therefore, that liability in such cases arises either from the servitutorial rights of the dominant and servient tenement holders respectively, or as a nuisance or alternatively from negligence (*Texas Co. (S.A.) Ltd. v. Cape Town Municipality*, 1926 A.D. 467; *Kakamas Bestuursraad v. Louw*, 1960 (2) S.A. 202 (A.D.) at 217, and *Thormahlen v. Gouws*, 1956 (4) S.A. 430 (A.D.) at 436-7), for the fact that a dam has burst in circumstances not constituting the defence of *vis major* will usually raise an inference of negligence which it will be difficult to rebut; while, even if liability is 'absolute', *vis major* will no doubt be a defence. Where the dam has been constructed under statutory authority, negligence will have to be proved.

Whatever the basis of liability, it will be a **defence** that the work was constructed in the course of 'reasonable and proper cultivation of one's property', and without negligence (see *Ludolph v. Wegner*, 6 S.C. 193, and *Labuschagne v. Steyn*, 1929 O.P.D. 20). It would appear that in South Africa this rule will apply to a farm dam, provided it is not for the supply of water to other neighbouring properties. It is possible that it would, by analogy, cover the construction in a town of a reservoir for the supply of water to the inhabitants thereof (see the dictum of Innes C.J. in the *African Realty Trust* case, 1927 A.D. at 177).

For washaways on roads see *ante* p. 142.

Illustrative cases

Many cases relate to municipalities where the question of statutory authority will usually arise. Statutory authority to construct roads and drains will carry the power to infringe on common-law rights; but if negligently exercised there will be liability (*Le Roux v. Cape Provincial Administration*, 1946 P.H., J. 5 (C)); see *ante*, p. 49 where the cases of *Johannesburg Municipality v. African Realty Trust*, and *New Heriot G.M. Co. v. Union Govt.*, are digested. For negligence in the construction of **drains**, see *Manuel's* case, 1877 Buch. 107; *O'Shea's* case, 12 S.C. 146; *Searight's* case, 17 S.C. 78; *McCarthy's* case, 1909 E.D.C. 170. Where a municipality alters the flow of water, it is under a duty to make due provision for carrying the water away (*Herzberg, Mullne, Ltd. v. Cape Town Council*, 1926 C.P.D. 451; *Parker v. Minister for Public Works*, 1945 C.P.D. (J/C. 5/45)), which includes keeping drains free and unblocked (*ibid.*; cf. *Eunson v. Port Elizabeth Municipality*, 1933 E.D.L. 237); but due provision does not include unreasonable and impracticable schemes (*African Realty Trust* case). In *Hall's* case, 16

S.C. 491, the increased flow washed away the road leading to plaintiff's property and the municipality was ordered either to restore the road or to pay damages. In *Domingo v. Colonial Govt.*, 22 S.C. 101, the defendant constructed the works on a third party's land.

A person or authority constructing an embankment for a road or railway ought to do so in such a manner as to be capable of resisting the violence of the weather including very heavy storms and the action of the sea (*Administrator, Natal v. Stanley Motors*, 1961 (1) S.A. 699 (A.D.)).

There is no liability where the work has not increased the natural flow in quantity, velocity, or concentration, or altered its direction (*Johannesburg Municipality v. Jolly*, 1915 T.P.D. 429; *Henley's case*, 4 E.D.C. 303; cf. *Tilbrook's case*, 4 Buch. A.C. 37). In *Kohne v. Harris*, 16 S.C. 144, defendant altered the drainage from a vlei by digging a canal on his land, and made no provision thereafter for carrying away the water, which damaged plaintiff's property. Plaintiff recovered damages. cf. *Victoria D.M. Co. v. De Beers*, 1 Buch. A.C. 300, where defendants perforated a barrier in their mine to drain it and threw water, in a concentrated stream, on plaintiff's property.

In *Solomon's case*, 1 H.C.G. 1, and *Austen's case*, 1 H.C.G. 363, defendants were held liable for flooding caused by the construction of an embankment to divert water. In *Margoschi's case*, 5 H.C.G. 469, defendants were held liable for flooding caused by an insufficiently large culvert. No action lies for flooding caused by the removal of an embankment which has only been there for ten years, the natural flow being restored by the removal (*Enslin v. Zuidmee*, 20 S.C. 443). But where water has flowed from time immemorial in an artificial channel, the lower proprietor may be compelled to keep it clear (*Ludolph v. Wegner*, 6 S.C. 193). Flood-water was discharged on plaintiff's land as a result of interference with rain-water. Held, that the work done on statutory authority must not be negligently executed or maintained (*Parker v. Union Govt.*, 1945 P.H., J. 11 (C)).

Where a waterpipe laid under statutory authority bursts, no presumption of negligence arises; negligence must be proved to found liability (*Nederlandsche Bank v. Johannesburg Municipality*, 1910 W.L.D. 145).

In *Van der Merwe v. Zak River Estates*, 1913 C.P.D. 1053, defendant's predecessor in title had built a dam and put an obstruction, which were defectively designed, in a river. Held, that defendant was liable, there having been negligence; and that defendant could not plead that it was the negligence of his predecessor, because 'any competent engineer would have told the company that the works were unsafe'.

In *Texas Co. v. Cape Town Municipality*, 1926 A.D. 467, it was ruled that as the plaintiff's rights were servitudal, it could not complain where the flooding was caused by its own failure, in exercising its rights of servitude, to make allowance for reclamation work by the defendant of which it had knowledge.

The plaintiff claimed damages owing to a leakage of water from defendant's dam, which water percolated on to his lands. The evidence established that some of the water stored in the dam would not have reached the plaintiff's land in the ordinary course, but there was no satisfactory proof as to the quantity of water penetrating his land. Held, that plaintiff had failed to establish his case (*De Villiers v. Galloway*, 1943 A.D. 439).

Respondent constructed certain works which had the effect of collecting water on his land and discharging it into a drain which ran near the boundary between his land and appellant's land. After this had continued for some years, appellant without notice to the respondent closed the drain and this action caused the water collected on respondent's land to flow on to appellant's land and cause damage to his crops. Held, that as the damage to appellant's crops was the direct result of his own action in closing the drain he could not recover (*Bhika v. Poliah*, 1930 N.P.D. 190).

Defendant had built a dam wall near his boundary thereby interrupting the natural flow of water from plaintiff's land and causing the water to be thrown back on to the plaintiff's land. Held, that the plaintiff was entitled to succeed (*Gorgens v. Williams*, 1945 P.H., J. 15 (C)).

Defendant excavated gravel on his own property, which excavations increased the flow of storm-water on to plaintiff's adjoining farm causing excessive erosion. Held, that the defendant had acted in disregard of the maxim *sic utere tuo ut alienum non laedas*

and that his complete failure to take any precautions to avoid damage amounted to negligence. On the question of damages it was held that a fair yardstick, by which to measure the damages, was the cost of restoration (*Pocock v. Schabert*, 1947 P.H., J. 16 (C)).

In *Markland v. Manchester Corporation* [1934] K.B. 585, a leak in one of the corporation's water-mains caused water to flood a highway. The water froze over after being exposed for three days and a motor-car travelling over it skidded into a pedestrian alighting from a tramcar. Held, that the corporation had been negligent in failing to acquaint itself with the presence of leaks and was liable in damages. The judgment was confirmed on appeal [1936] A.C. 360).

CHAPTER XII

FIRES AND FIRE-ARMS

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DAMAGE CAUSED BY VELD BURNING

(a) ONUS

Liability for damage caused to others by burning one's veld is based upon negligence (*Lotter v. Rhodes*, 19 S.C. 122; *Van Tonder v. Alexander*, 1906 E.D.C. 187). Prior to 1941 it was not, in itself, a negligent act to light a fire in one's veld, and the mere fact that a fire thereafter spreads from one's property to one's neighbour's raised no inference of negligence in that regard (*Arnagiri v. Moliffe* (1908) 29 N.L.R. 80; *Cambridge Municipality v. Millard*, 1916 C.P.D. at 728). Section 26 of the Forest and Veld Conservation Act, No. 13 of 1941, now, however, provides:

'Notwithstanding the provisions of any other law whenever in any proceedings under this Act, or at Common Law, the question of negligence in respect of damage from veld or forest fires arises, negligence **shall be presumed** unless the contrary is proved.'

Obviously this section is applicable to civil as well as to criminal proceedings (*Barker v. Venter*, 1953 (3) S.A 771 (E) at 783). Here Van der Riet J. held that, unless the defendant had satisfied himself that his servant

was a reliable person, he should have seen to it that the common boundary between his land and that of the plaintiff was separated by an adequate firebelt. The ruling in *Van Reenen v. Glenlily V.M. Board*, 1936 C.P.D. 315, therefore, to the effect that the fact that the veld is in an inflammable condition and that the owner has permitted third parties to come on to his land for some purpose other than lighting fires, casts no duty upon him of exercising supervision over them, or of constructing a firebelt, must now be read subject to the aforementioned presumption of the Act. In passing it should be noted that section 15(a)(iii) of the Act makes it a criminal offence to light, assist in lighting, or to rekindle any fire on State or private forest, while section 15(b)(ii) creates a criminal offence for any person, either personally or through his servant or agent to light a fire on **any land** if the said fire, through negligence, spreads or causes damage. Section 20 entitles any person, who has good reason for believing that any fire in open air may become dangerous to life or property and, if he acts in good faith, to enter, either alone or with other persons under his control, for the purpose of extinguishing such fire or of preventing an extension thereof. For this purpose he may cause reasonable destruction of trees, grass or crops on that land. Furthermore, no damages for trespass or damage caused by him when acting in good faith, may be claimed.

There is no definition of 'veld fire' in the Act, but it does define 'veld' as meaning 'uncultivated and unoccupied land excluding land in the immediate vicinity of the household' (cf. *Van Wyk v. Hermanus Municipality*, 1963 (4) S.A. 285 (C) at 294, following the dictum of Kotzé J. in *West Rand Estate, Ltd. v. New Zealand Insurance Co.*, 1925 A.D. 245 at 253).

(b) DEGREE OF CARE

In view of the destructive and uncontrollable nature of fire, the degree of care required is a high one (per Dove-Wilson J.P. in *Frenkel & Co. v. Cadle*, 1915 N.P.D. at 184, and per De Villiers J.P. in *Fourie v. Sang*, 1924 O.P.D. 153). In most cases some degree of **supervision**, at the very least, will be required; for to kindle the veld at all may be negligence in certain conditions such as in a high wind. In other cases it seems likely that a **fire-path** would have to be maintained.

From the various decisions deliberating on the degree of care required in regard to the lighting of fires it appears that the following are important points to be considered.

- (a) *The wind*. If it is a windy day it is highly inadvisable to light a veld fire (*Van Tonder v. Alexander*, 1906 E.D.L. 187; *Walbrugh v. Newmark*, 1912 C.P.D. 725, and *Hendry's case*, 1924 T.P.D. 165). As to an unexpected change of wind, see *Brink v. Cloete* (below).
- (b) *The possibility of wind*. If the locality is such that, at that time of the year, winds are apt to spring up with startling suddenness, then the careful man should adjust his actions accordingly (*Glass v. Grahams-town Municipality*, 18 E.D.C. 244; *Apollis v. Jarom*, 12 E.D.C. 187; *Van der Byl v. Smit*, 1896 Buch. 183 and *Van Tonder v. Alexander*, 1906 E.D.C. 187).
- (c) *The attendants*. There should generally speaking be some person in attendance at the place of the veld fire, for to start a fire and then leave

it unattended when it may spread and cause damage is negligence (*Brink v. Cloete*, 1869 Buch. 215; *Frenkel & Co. v. Cadle*, 1915 N.P.D. 173; *Apollis v. Jarom*, 12 E.D.C. 187; *Durban C.C. v. S.A. Board Mills*, 1961 (3) S.A. 397 (A.D.)).

- (d) *The fire-break.* To commence veld-burning without an adequate fire-break to prevent the fire spreading is inviting trouble (*Conrad v. Cambridge Municipality*, 1921 E.D.L. 4, and *Barker v. Venter* (*supra*)). The adequacy of the width will depend on the circumstances, for grass fires have been known to jump broad roads and even rivers, while bush and forest fires have carried conflagration over spaces of hundreds of feet on very windy days. Failure to maintain a fire-path in a clear condition can also be negligence (*Steenkamp v. S.A.R. & H.*, 1950 (2) S.A. 56 (T)).
- (e) *Warning to neighbours.* The Old Cape Plakaten requiring the giving of notice, or the provision of a fire-path, referred to in *Van Reenen v. Cloete*, 1869 Buch. 219, has been re-enacted in part by section 19 of Act No. 13 of 1941 in respect of land bordering State or private forests. This section provides that any person proposing to make a fire-belt on such land shall serve on the person adjacent to such land at least seven days' notice of his intention to do so. (As to what is a 'private forest' see *Minister of Forestry v. Michaux*, 1957 (1) S.A. 698 (N).) For Rhodesia see section 58 of Cap. 187 as amended by section 9 of Act No. 19 of 1965.

(c) ACTS OF OTHERS

(1) **Servants.** The general position of the owner, or other persons in control of land, being liable for the acts of his servants while 'acting in the course of their employment' has been dealt with *supra* at p. 113. The master may incur liability where he has given instructions to his induna (the actual culprit) to burn (*Van Rooyen v. Humphrey*, 1953 (3) S.A. 392 (A.D.)). But the fact that the fire was caused while the servant is on duty does not necessarily imply that the act was done in the course of his employment (*Meyer v. Jackelson*, 1961 (3) S.A. 165 (T)), for an act may be in the course of employment but not within the scope of such employment (*Centuary Insurance Co., Ltd. v. Northern Ireland Road Transport Board* [1942] 1 All E.R. 491 (H.L.)). This was a case where an employee, while delivering petrol in bulk, lit a cigarette and threw away the lighted match thereby causing a fire and explosion with considerable damage and here Lord Wright (at 497G) said:

'The act of a workman in lighting his pipe or cigarette is an act done for his own comfort and convenience and at least, generally speaking, not for his employer's benefit. . . . Nor is such an act *prima facie* negligent. It is in itself both innocent and harmless. The negligence is to be found by considering the time when and the circumstances in which the match is struck and thrown down. The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to his employer himself or his property or to third persons or their property, and thus impose the same liability on the employer as if he had been doing the work himself and committed the negligent act. This may seem too obvious as a matter of common sense to require either argument of authority.'

(2) **Independent contractors:** Since the kindling of a fire, or the use of a blow-lamp, is per se dangerous the employer of the contractor will, in general, be accountable for damage caused thereby to third persons (*Balfour v. Barty-King* [1956] 2 All E.R. 555 (Q.B.); *Crawhall v. Minister of Transport and another*, 1963 (3) S.A. 614 (T)). This matter is more fully dealt with *ante* at p. 123).

(3) **Strangers:** It has been held that where a fire is kindled by a stranger or trespasser, over whom the owner, or occupier, had no control and without his knowledge, the fact that he thereafter becomes aware of the fire throws no duty upon him to take active steps to extinguish it, even though he should realize the danger to third parties (*Van Reenen v. Glenlily F. & P. Village Management Board*, 1936 C.P.D. 315, approved of in *Van Wyk v. Hermanus Municipal Council*, 1963 (4) S.A. 285 (C) at 293, 295). This latter decision is in conflict with that of the House of Lords in *Sedleigh-Denfield v. O'Callaghan* [1940] 3 All E.R. 349 (H.L.) (which was cited and considered in *Van Wyk's* case at 293). Here Viscount Maugham (at 357) cited with approval the dissenting dictum of Scrutton J.A. in *Job Edwards v. Birmingham Navigation Co.* [1924] 1 K.B. 341, where the latter said at 357:

'If a man finds a dangerous and artificial thing on his land which he and those for whom he is responsible did not put there, if he knows that if left alone, it will damage other persons and if, by reasonable care he can render the thing harmless, as if by stamping on a fire just beginning from a trespasser's match, he can extinguish it, then, if he does nothing, he has "permitted it to continue" and (he) becomes responsible for it.'

and (at 378) added:

'I appreciate that to get negligence you must have a duty to be careful, but I think that the principle that a landowner has a duty to take reasonable care not to allow his land to remain the receptacle of a thing which must, if not rendered harmless, cause damage to his neighbour.'

It should be noted that in the *Sedleigh-Denfield* case (*supra*) Viscount Maugham expressly excluded the application of the principle laid down in *Rylands v. Fletcher* (1868) 3 H.L. 330 at 354.

While Watermeyer J. in *Van Wyk's* case (particularized below at p. 237) was correct in addressing himself (at 295) as to the rule in regard to 'mere omission' being no ground for action on the basis of *culpa*, it is submitted that his conclusions as to the averment of negligence on the part of the defendant were not correctly drawn since, in that case, there had been a *successful assumption of the control of the fire*.

It is submitted, therefore, that where a landowner or lawful occupier has taken *active steps* to confine a fire coming on to his land from that of his neighbour, and has *succeeded* in so doing, he would thereafter be liable for his negligence in not taking due care to see that the said fire does not again flare up from the coals thereof which should have been properly extinguished. The failure of the defendant's servants in *Van Wyk's* case were categorized as an 'error of judgment' in a failure to foresee that a wind from the north-west would have arisen but, as indicated above (*ante*, p. 233), this is a contingency which, in the Western Province of the Cape, should have been anticipated, by any reasonably careful man. It is contended, therefore, that the decision in *Van Wyk's* case should have

gone the other way, and that probably the last word has yet to be spoken in this regard.

On the other hand there is no positive duty upon a landowner to protect his own property by maintaining fire-paths and, consequently, a defendant cannot rely on the absence of fire-paths as substantiating a plea of contributory negligence (*Van Reenen's case (supra)*, citing *Mkize v. Martens*, 1914 A.D. at 402, *Royston v. Dennis*, 1915 N.P.D. 74).

Where, however, a fire is lit by one of two joint tortfeasors who are all trespassers, and whose act is *ex hypothesi* a wrongful one, if the act cannot be brought home to one of them, then the onus will be on all of them to show that the fire originated in circumstances for which each is not liable (*Van der Westhuizen v. Smith*, 1905 T.S. 108 at 110).

In Rhodesia, the owner or occupier of land is under a statutory obligation to take all reasonable steps to extinguish, or prevent the spread of, a fire once he is aware of it on his property (section 66 of the Forest Act, Cap. 187), while in South Africa section 26 of Act No. 13 of 1941 merely creates a presumption of negligence in any proceedings under the Act or at common law, a presumption which was not negated in *Barker v. Venter*, 1953 (3) S.A. 771 (E).

From the above considerations it is possible to postulate the following rules:

- (a) a landowner or occupier is not bound to take any steps to prevent a fire either coming from his neighbour's land, or ignited by a stranger or trespasser, on his own land from spreading on to another's land, save in Rhodesia.
- (b) nor can he be held liable if he attempts to extinguish the fire, but is unsuccessful in doing so;
- (c) if, however, he does succeed in controlling the fire, he should take all reasonable steps in extinguishing it completely and, if he is negligent in this respect he may be found liable in damages at the suit of a person on to whose property the fire from the embers have subsequently spread.

Spontaneous combustion: Where a fire occurs, probably by spontaneous combustion, and thereby causes damage it would be competent to impute liability by reason of the fact that a similar fire had broken out some sixteen days previously owing to the same cause (*Durban C.C. v. S.A. Mills, Ltd.*, 1961 (3) S.A. 397 (A.D.)).

Fires in Motor Vehicles: Where the owner of a motor vehicle is aware that highly inflammable material or goods are being conveyed in his motor vehicle he should see to it that the vehicle is adequately provided with fire-fighting apparatus (*Ngedle v. Marine & Trade Insurance Co., Ltd.*, 1969 (4) S.A. 19 (T) (summarized below).

Criminal cases

In Rhodesia it is an offence to leave, unattended, a fire in the open air or on any land. This includes the deposit of live ashes on an ash-heap (*R v. Sponje*, 1964 (2) S.A. 17 (S.R.)) (see section 67(B), Cap. 187). But lighting a cigarette does not constitute the lighting of a fire within the

meaning of section 42(b)(ii) of the Act (*R v. Mafigo*, 1964 (2) S.A. 19 (S.R.)).

A person who lights a counterfire should take all reasonable steps to prevent that fire from spreading to another's property (*R v. Follitt*, 1955 (3) S.A. 478 (S.R.)).

Illustrative cases

In *Brink v. Cloete*, 1869 Buch. 215, a fire was kindled and left unguarded; the wind changed and it spread to plaintiff's property. Held, that there had been no negligence. This case, and the other early cases of *Van der Byl*, *ibid.*, at 183, and *Van Reenen*, at 219, are considered in *Glass v. Grahamstown Municipality*, 18 E.D.C. 244, where Kotzé J.P. remarked that the change of wind might have been anticipated; and held defendant liable for kindling a fire on a windy day and not guarding it adequately. See *Apollis v. Jarom*, 12 E.D.C. 187, where the wind got up and sent the fire into plaintiff's property, and *Van Tonder v. Alexander*, 1906 E.D.C. 187, where the wind suddenly changed.

In *Lotter v. Rhodes*, 19 S.C. 122, De Villiers C.J. ruled that it was within the scope of employment of a shepherd to light his master's veld: 'The courts can scarcely disregard the custom of setting fire to bushes for the sake of pasturage' (cf. the chapter on Master and Servant); and held the owner liable for the servant's negligence in lighting and not attempting to control it. But 'the mere allegation that defendant lighted a fire which burned plaintiff's forage is insufficient, for the burning of grass on one's own land is a perfectly legitimate act, so long as it is done with care' (*Arnagiri v. Moliffe*, 29 N.L.R. 80).

In *Hendry v. Oomkens & Shallies*, 1924 T.P.D. 165, defendants had left a bucket containing fire within 20 yards of their boundary, next to which plaintiff's property carried dry grass. The bucket was found on its side, next to the boundary. The day was windy, and there was some evidence that the wind might have blown the bucket this distance. Held, that a *prima facie* case had been made out, and that the magistrate was wrong in granting absolution. The case was sent back for defence evidence. In this case it was also decided that when a thing is shown to be under the management of the defendant and it causes an accident such as ordinarily does not happen if those managing it use proper care, the event itself affords reasonable inference, in the absence of explanation by the defendant, of negligence.

In *Frenkel & Co. v. Cadle*, 1915 N.P.D. 173, defendant lit a fire and did not guard it. It jumped a fire-path maintained by him. Held, that to leave the fire unattended was negligence. 'The burning of grasslands is a matter which must be undertaken with the greatest care. Here no supervision whatever was exercised.' Held, further, that defendant was liable even if he could not reasonably have foreseen that the fire would jump the fire-path. This aspect of the case is discussed *ante* at p. 96. The decision is somewhat difficult to reconcile with *Fourie v. Sang*, 1924 O.P.D. 153, digested below, where, largely because of the apparent adequacy of his fire-path, defendant was held not to have been negligent.

Van Reenen v. Glenlily V.M. Board, 1936 C.P.D. 315: Defendant allowed third parties to come upon its land for various purposes. Chopped branches were left lying near the boundary. Held, that this threw no duty of supervision on it, nor the duty to maintain a fire-path. Defendant's servants had notice of the outbreak of a fire (cause unknown), and did not take immediate steps to put it out. Held, that no duty lay upon defendant to be diligent in extinguishing the fire. In this case it was also held that it was negligence to have no fire-break and that one is not obliged to put out a fire lighted by others on one's property. The latter ruling is, however, suspect (see above).

Van Wyk v. Hermanus Municipality, 1963 (4) S.A. 285 (C): A fire started on a golf-course and spread on to defendant's adjoining commonage, whence it spread on to plaintiff's property after jumping a fairway. The defendant's servants attempted unsuccessfully to extinguish the fire on the golf-course but managed to bring the fire on the commonage completely under control, and the defendant's fire-brigade remained to watch and deal with it, since it was smouldering in certain places. The fire burned in various places for three days until a wind arose and freshened into a gale, causing certain embers to ignite and destroy plaintiff's house. Held, on the facts, that plaintiff's case failed.

Ngedle v. Marine & Trade Insurance Co., Ltd., 1969 (4) S.A. 19 (T): An agent of the owner was driving a motor vehicle containing highly inflammable perspex sheets and also some plastic petrol containers together with some twenty-four passengers who were allowed to smoke whilst travelling although they had been warned to be careful. Owing to the carelessness of one or some of them, with a match, or cigarette or pipe, the perspex sheets caught alight and the rear portion of the vehicle became a raging inferno causing injuries to the plaintiff. Held, that the driver had not been negligent inasmuch as he had stopped as soon as possible, but that the owner of the vehicle had been guilty of *culpa* in not providing any, or adequate, fire-fighting facilities. Held, further, that the injuries had been caused during or arising 'out of the driving of a motor vehicle' in terms of the Motor Vehicle Insurance Act.

Durban City Council v. S.A. Board Mills, Ltd., 1961 (3) S.A. 397 (A.D.): Respondent, a manufacturer of fibre boards, had stacked bales of salvaged waste paper and bagasse in the open, some 100 feet away from appellant's rubbish dump site. Spontaneous combustion set in on the rubbish dump and spread to respondent's stacks and thence to its factory. Held, that appellant should have seen that no inflammable material such as paper, cardboard and cement bags were left loose on the dump in a position in which it might be set alight and blown away and that instructions should have been given to its servants on fire precautions so as to prevent the spread of a fire which originated on the dump.

Fourie v. Sang, 1924 O.P.D. 153: The standard of diligence is a high one. Here the engine of a mealie crusher fitted with a spark arrester caused a fire. There was a fire-belt of 106 yards around it. Held, not negligent.

Van Tonder v. Alexander, 1906 E.D.C. 187: Defendant kindled a grass fire when a light wind was blowing. He did not provide sufficient means for controlling the fire. The wind changed and blew strongly from another direction. Held, he was liable in damages (Paulus, *Digest*, cited). A sudden gust of wind is a good defence (at 187) but it is negligence to light a fire on a windy day.

Van der Byl v. Smit, 1869 Buch. 183: Damages were granted where defendant kindled and suffered a fire to spread to Groote Schuur. There was a fire-path and defendant was burning rubbish. *Quaere*, whether January was a proper time for burning since winds are known to arise suddenly in January.

Apollis v. Jarom, 12 E.D.C. 187: Defendant set fire to grass on his own property and the wind caused the flames to spread to plaintiff's orchard. Held, defendant was liable, as the servant did not remain to watch the fire.

Glass v. Grahamstown Municipality, 18 E.D.C. 244: Defendant was burning grass on a windy day. He did not provide a sufficient number of men to watch and control the fire. Held, that slight negligence was sufficient. Action founded on *culpa*. He was liable, although a sudden gust of wind arose (at 246).

Conrad v. Cambridge Municipality, 1921 E.D.L. 4: When a fire may be anticipated being made by members of the public, it is negligence not to keep an adequate fire-break.

Brink v. Cloete, 1869 Buch. 215: A fire was lighted when a south-east wind was blowing. The wind freshened and the fire spread. Held, that the damage was caused by a change of wind which could not have been foreseen and was not expected.

Van Reenen v. Cloete, 1869 Buch. 219: Brushwood and undergrowth were fired. A wind sprang up three hours later. Held, defendant was not liable.

Walbrugh v. Newmark, 1912 C.P.D. 725: Fire lit at a time when there was a south-easter blowing in the direction of plaintiff's boundary. No evidence that defendant had a staff of men sufficient to control the fire. No notice given of defendant's intention to burn. Held, liable in damages.

In *Van Rooyen v. Humphrey*, 1953 (3) S.A. 392 (A.D.), appellant had instructed his Native induna to burn a paddock when the wind was favourable, but left it to the induna to decide when this should take place. The induna instructed two Natives to do the burning, but had left the farm altogether when the burning took place. Held, that appellant was vicariously liable in damages.

See also Norman-Scoble, *Master and Servant*, p. 270.

STEAM-ENGINES

(a) RAILWAY LOCOMOTIVES

Railway locomotives operate under a statutory authority which impliedly authorizes the emission of sparks, in so far as they cannot be prevented by the exercise of due care (*Union Govt. v. Sykes*, 1913 A.D. 156). Consequently, the Administration was liable for fires caused by the emission of sparks by its engines only if negligence could be proved.

Onus

There is, however, a special statutory provision in respect of the onus of establishing negligence. Section 69 of Act No. 70 of 1957 provides that:

'In any action for the recovery of damages sustained in consequence of a fire occasioned by a locomotive engine upon a railway, it shall not be incumbent upon the plaintiff to prove that such fire was occasioned by the negligence of the Administration or of the owner of any private railway, but such **negligence shall be presumed** unless rebutted by the defendant.'

An identical provision to the above (see section 70 of Act 22 of 1916) followed upon *Sykes's* case, in which their Lordships expressed some doubt as to the incidence of the onus in a case of fire caused by locomotives.

This section, it will be noted, does not alter the **basis** of liability, which remains negligence; *it affects only the onus of proof*. In effect, it establishes a prima facie case of negligence whenever it is shown that the fire was 'occasioned by a locomotive engine upon a railway'. The plaintiff must first prove that fact; the prima facie case then follows (*Moonsamy v. S.A.R. & H.*, 1962 (4) S.A. 682 (N) at 685); It can then be rebutted by the Administration, or other defendant, by evidence negating the statutory presumption. In *Noble v. S.A.R. & H.*, 1943 N.P.D. 300, it was ruled that this section raised a presumption rebuttable on the part of the defendant, and if the latter proves that the performance of his statutory right must necessarily involve some interference of the nature complained of, with the rights of others, the onus then falls on the plaintiff to prove that by the adoption of reasonable practicable precautions the extent of the risk would have been lessened. See also *Ross v. S.A.R. & H.*, 1938 O.P.D. 128, and *Peinke v. S.A.R. & H.*, 1925 E.D.C. 138.

Some difficulty is caused by the fact that the presumption is a general one of negligence, not founded upon specific allegations, as it would be in the ordinary case; but, in practice, the Administration will no doubt plead specifically that there was no lack of care in the matters in respect of which negligence would usually be alleged in such cases, and will attempt to prove due and proper equipment and careful operation, such as (1) that the provision of **fire-paths** was adequate; (2) that the **spark-arrester** on the engine was of the most modern type and in perfect order, (3) that the **engine** was in all respects **properly handled**, (4) that the ashpan of the engine was in good working order (cf. *Frame v. Union Government* 1916 E.D.L. 453, and *Moonsamy v. S.A.R. & H.* (*supra*)), allegations which, if established, would rebut the inference of negligence unless there was evidence of negligence in some other, unusual, respect. The Administration may, of course, allege and establish that the fire was not caused by the engine at all but emanated from some other source (*Moonsamy's* case (*supra*)). In

Harvey v. S.A.R. (Durban Local Div., Nov., 1924), it was said that 'if every reasonable precaution was taken in the light of the scientific knowledge of the day, and having regard to the construction of engines, proof thereof by the Administration would rebut the presumption arising under section 70 (now section 69), although the fire was actually occasioned by it'. As a mere matter of pleading, a general denial of negligence is sufficient (*Lloyd's case*, 1916 N.P.D. 7), nor is it obligatory for plaintiff to give particulars of negligence even though he has pleaded it (*S.A.R. & H. v. Du Preez*, 1953 (1) S.A. 81 (C), and *Moonsamy's case* (*supra*) at 684).

Duties

The principal question in these cases usually turns upon the efficiency of the **spark-arrester**. It is incumbent on the Administration (a) to equip its engines with a spark-arrester of reasonably good type, having regard to the prevailing level of knowledge and invention (*Sykes's case*); (b) to take reasonable steps to see that it is in **good order**; and (c) to operate its engines in such fashion, consistent with the proper running of its service, as not to increase the risk of emission of sparks (*Peinke's case*, 1925 E.D.L. 138). In *Ross and another v. S.A.R. & H.*, 1938 O.P.D. 128 at 132-5, it was held that it was not necessary for the defendant to establish that it had the latest practicable spark-arrester known to science available. Nevertheless it should prove that the spark-arrester was of 'the best type reasonably available' (*Moonsamy's case* (*supra*) at 688G). Having regard to the character of the South African veld, it is also its duty, where reasonably required, to maintain a clear **fire-path** (*Rhodesia Railways v. Asserman*, 1920 A.D. 64).

Absolute limited liability and damages

The liability of the Administration has, subject to certain limits in respect of monetary damages claimable, now been made **absolute**, irrespective of negligence on the Administration's part. See section 70 of Act No. 70 of 1957, as amended by section 42 of Act No. 44 of 1959:

'70bis. (1) When any property has been destroyed or damaged (whether as a result of negligence on the part of the Administration, or without such negligence) by a fire caused by a burning object which emanated from a railway locomotive engine or railway train operated by the Administration (whether directly by coming into contact with, and igniting, inflammable material on the land on which the destruction or damage occurred, or indirectly by setting fire to inflammable material at any place from where the fire spread to the said land) the Administration **shall**, subject to the provisions of sub-sections (2), (3) and (4), **pay to any person** who has suffered any loss by reason of that destruction or damage, compensation for that loss, if the said person was, at the time when the destruction or damage occurred, the **owner or occupier** of the land on which the destruction or damage occurred.

- (2) The amount of any compensation payable under sub-section (1)—
- (a) to any one person for any such loss which resulted from any one such fire shall not exceed the sum of *one thousand pounds*.
 - (b) to two or more persons (whether jointly or severally) who have, as a result of any one such fire, suffered any such loss by reason of the destruction of or damage to, any property which they owned or occupied jointly, shall not exceed in the aggregate the said sum:

Provided that any person who owns any land jointly with any other person and who, by agreement with that other person, has the exclusive occupation or use of that

land or any part thereof, shall, for the purposes of this sub-section, be deemed to be the sole owner of the land which he is entitled to occupy or use under that agreement.

(3) No compensation shall be payable to any person under sub-section (1)—

- (a) if he or his servant or agent **contributed** in any way towards the destruction or damage in question or failed to take all reasonable steps to prevent or mitigate that destruction or damage; or
- (b) if the land on which the destruction or damage occurred was **not fully protected against any such fire** by a fire-break as defined in sub-section (5); or
- (c) if the said land was **protected** by means of a fire-break as defined in sub-section (5), which, in so far as it was made specially for the purpose of preventing destruction of, or damage to property by such a fire, was made entirely by the Administration **at its own cost**, at the request or with the consent of the owner or occupier of the land on which the destruction or damage in question occurred.

(4) The Administration *may*, notwithstanding the provisions of paragraph (b) of sub-section (3), in determining the amount of compensation payable to any person under sub-section (1) in respect of any land, take into account, subject to the provisions of sub-section (2), also any destruction or damage which occurred as a result of the same fire on land owned or occupied by the said person which is situated between the fire-break whereby such first-mentioned land was protected and the railway line from which the fire emanated.

(Subsections (4)*bis* and (4)*ter* merely deal with the financial rights of the parties where agreements are entered into between the owners or occupiers of land bordering railway lines and the Administration in regard to the erection and maintenance of fire-breaks.) Failure by a farmer to keep his fire-break cleared, in terms of an agreement with the Administration, will non-suit him (*Steenkamp v. S.A.R. & H.*, 1950 (2) S.A. 561 (T)).

(5) In this section "fire-break" means an area or areas devoid of inflammable material, which is or are of such an extent and situated in such a position in relation to the land in question, that the said area or areas can reasonably be expected—

- (a) to prevent any such burning object as aforesaid from reaching and igniting any inflammable material on the said land; and
- (b) to prevent any fire lit anywhere, by any such burning object, from spreading to any inflammable material on the said land.

(6) The preceding provisions of this section shall not deprive any person of any right which he may have, apart from this section, to recover compensation from the Administration for any loss which he may have suffered as a result of such a fire as is mentioned in sub-section (1).'

The words 'fully protected' in section 70(3)(b) are not to be construed as 'completely protected'. The test is whether, objectively speaking, the fire-break could reasonably be expected to prevent objects emanating from the engine reaching and igniting plaintiff's property (*Moonsamy's case (supra)*). Here it was held that a fire-break some 15 feet wide is not adequate, seeing that sparks can be emitted and thrown in a burning condition as far away as 75 feet but, since the railway reserve was as wide as 100 feet, there was no explanation as to why the line did not travel in the middle of the reserve but was only some 32 feet from plaintiff's ground (at 688).

Procedure and notice

The plaintiff must allege and prove that he has given one month's notice of intention to commence proceedings within twelve months after the cause of action (*Evert v. Minister for Railways*, 1960 (3) S.A. 841 (T)). The month's notice may be given by a cessionary before he has actually received cession of the claim (*Legal & General Assurance Co. v. S.A.R. & H.*, 1962 (1) S.A. 660 (O) at 662) (see, more fully, *post*, p. 517).

Illustrative cases

In *Union Govt. v. Sykes*, 1913 A.D. 156, the Court held that the arrester was of satisfactory type; and (by a majority of 3 to 2) that it had been shown to be in good order at the time of the fire. Per Innes J.: 'Frequent inspection may not unreasonably be required of the Administration.' In *Union Govt. v. Umhloti Valley Co.*, 1913 A.D. 534, it was held that there was evidence from which the jury might conclude that the arrester was defective. In *N.S.A.R. v. Meyer* (1899) 6 O.R. 137, where no evidence was led of the condition of the arrester, the railways were held liable.

In *Peinke v. S.A.R.*, 1925 E.D.L. 138, there was evidence that the engine laboured unduly on an up-grade; that steam had to be kept up to full pressure in order to keep the brakes in proper condition; that an engine operated with a forced blast would emit more sparks than otherwise; and that there was a very heavy emission of sparks. Held, that the Administration had not rebutted the inference of negligence.

As to **fire-paths**, see *Lategan v. Colonial Govt.*, 14 C.T.R. 935; *Rhodesia Railways v. Asserman*, 1920 A.D. 64; *Lamb v. Colonial Govt.*, 14 E.D.C. 103, and *Rhodesia Railways v. Moffat*, 1916 S.R. 116. Where the Administration is refused leave by the plaintiff to make a fire-path on his property, this does not affect his right to damages—see the argument in *Sykes's* case (at 158).

In *Steenkamp v. S.A.R. & H.*, 1950 (2) S.A. 561 (T), plaintiff's neighbour, B, had failed to keep his fire-path, bordering the railway line, in good order and condition, with the result that a spark falling upon it set the grass alight and the fire spread on to plaintiff's property. Held, that as the Railways were entitled to expect that B would maintain his fire-path in proper order, it was protected by subsection (3)(c) of section 70(bis) of the Act.

(b) ROAD LOCOMOTIVES

In English law, a road locomotive which emits sparks when travelling upon a public highway was initially treated as a nuisance; and the owner is liable for damage even if he was not negligent (*Powell v. Fall*, 5 Q.B.D. 597; Halsbury, vol. 16, sec. 484, p. 360). The statute permitting the use of such vehicles now, however, expressly saves the liability for nuisance (Halsbury, vol. 33, sec. 1338, and Beven, p. 557).

From the dicta in *Sykes's* case, 1913 A.D. 169 at 177, and from general principle, it is extremely likely that our courts would reach the same conclusion; though the rule would be stated in the slightly different form, i.e. that to operate a dangerous machine on the public highway is itself *culpa*, not in the narrow sense of negligence but in the wide sense of the doing of a forbidden act. The fact that the locomotive was licensed for revenue purposes, or even for purposes of inspection, would not affect the matter, since the relevant statutes could not be considered as authorizing by implication, the infringement of the right of the public not to be endangered by its use.

No doubt the liability would extend only to damage caused by the ordinary consequences of the use of such a vehicle, such as the emission of sparks. If, however, some extraordinary damage were to be caused, for example, by the bursting of the boiler, negligence would have to be established.

(c) STATIONARY ENGINES

The question of liability for fire caused by stationary machines is one of some difficulty. In English law, where an occupier brings fire on to his property and it escapes and does damage, the rule of *Rylands v. Fletcher* covers the case (*ante*, p. 217), and there is liability irrespective of negligence.

This rule certainly is not applied in South Africa in cases of the burning of veld. But the dicta in *Sykes's* case, cited above, appear to indicate that it might be treated as matter of nuisance (i.e. *culpa* in the wide sense) if a machine liable to emit sparks was brought upon private property and operated there. Perhaps, however, those dicta are to be restricted to cases where the sparks emitted (as from a railway locomotive) must almost necessarily fall upon the property of another. In *Fourie v. Sang*, 1924 O.P.D. 153, defendant had operated a threshing machine, a spark from the engine of which caused a fire which burnt plaintiff's veld, and De Villiers J.P. said that it was 'quite clear that in a case like this negligence was the foundation of the action', citing *Lotter v. Rhodes*, 19 S.C. 122, and *Van Tonder v. Alexander*, 1906 E.D.C. 187, which are cases of the lighting of veld. It does not appear from the report whether the contention of nuisance was advanced in argument. It may be observed that the machine was not being operated by the defendant on his own property (the headnote is incorrect in this regard); it is therefore not clear that the rule in *Rylands v. Fletcher* would in any event apply. Furthermore, the spark emitted from the machine apparently did not fall upon plaintiff's property but upon the property on which the machine was being operated, and caused a fire which then spread to plaintiff's property, so that it might be considered rather far-fetched to describe the machine as a nuisance in respect of the plaintiff. The **rule** may perhaps be stated in this form: To operate, on one's own property, a machine which is liable to throw sparks on one's neighbour's property, would constitute *culpa* in the wide sense—being a forbidden act or nuisance. But if one were to operate a machine which is liable to emit sparks on one's own property and not near one's neighbour's boundary, one would be liable civilly in damages only if it can be shown that insufficient precautions were taken to prevent a fire spreading to one's neighbour's property, e.g. on the ground of *culpa* in the narrow sense of negligence.

In *Fourie v. Sang* (*supra*), defendant fired his machine with mealie-cobs; the day was windy, but he had made a fire-path over 100 yards wide. The evidence showed that this would ordinarily be regarded as more than ample. Held, that no negligence had been established and that defendant was not liable.

EXPLOSIONS OF PETROL AND GAS

The liability for causing a fire owing to neglect in appreciating that the fumes of petrol (and like substance) are a highly combustible material has been considered and determined in two conflicting cases: one, that of *In re Polemis v. Furness, Whitby & Co.* [1921] 3 K.B. 560, which appears to go rather too far, and the other *Levin v. Lockhart-Ross*, 1939 T.P.D. 363, which does not seem to go far enough. In the *Polemis* case the charterers had loaded certain tins of benzine and petrol into the hold of a ship. During the voyage the tins leaked, with the consequence that there was considerable petrol vapour in the hold. At one of the ports of call certain stevedores, employed by the charterers, were engaged in shifting some of the cases of benzine and for that purpose placed a number of heavy planks to form a platform at the end of the hatchway. Owing to the negligence

of one of the stevedores one of the boards fell and immediately there was a rush of flame resulting in the total destruction of the ship. The arbitrators found that the cause of the fire was due to the falling board causing a spark when it came into contact with some substance in the hold, but that the spark could not reasonably have been anticipated from the mere falling of the board. (This seems to be correct.) Held, however, that the charterers were liable for the *direct consequences* of the act of the stevedores, even if those consequences could not reasonably have been anticipated, and that they were therefore liable in damages. This decision would not now be followed in this country (see *ante*, pp. 81-4).

In *Levin v. Lockhart-Ross* (*supra*), on the other hand, the appellant had arrived at the scene of a motor-car collision some half-hour after the event. A crowd of persons, some of whom were smoking, were standing in the vicinity of the respondent's damaged car. Appellant lit a cigarette and threw the *still lighted match* in the direction of the car, causing petrol, which had leaked out of the car on to the ground, to become ignited and thereby cause the total destruction of the car. Held, on the facts that the respondent had not discharged the onus of proving that the appellant should have foreseen the consequences of his conduct. It is submitted that in this case, at any rate, the decision should have been for the respondent car owner.

These cases are illustrations of opposing points of view (namely, the 'direct cause' theory and the 'foreseeability' theory) which have already been discussed (*ante*, pp. 81-2), and either of which may be driven to absurd lengths. The true test is, however, to be found in the decision in *Brown v. Hunt*, 1953 (2) S.A. 540 (A.D.), where the defendant's servant had, while supplying petrol to a motor-car, allowed some petrol to spill over on to the ground. For some unexplained reason this petrol caught fire and the servant then played water from a hose on to the fire, thereby driving it towards plaintiff's car which caught alight and was destroyed. Held, that defendant was liable in damages since the training and special aptitude of persons dealing with petrol should have given him the ability to deal adequately with this dangerous situation.

In *Yachuk v. Oliver Blais Co.* [1949] 2 All E.R. 150 (P.C.), defendants had been prevailed upon by the untrue statement of a boy of 9 years to sell him a small quantity of petrol. The boy, in imitating a Red Indian scene, was badly burnt. Held, that as the defendant's employee had had doubts as to the truthfulness of the boy's statement and had told the assistant manager about it, and had asked him to confirm that he had acted rightly (at a time when the boy was not yet beyond recall), defendant was liable in damages.

As to the duty case upon the owner of a motor vehicle to provide adequate fire-fighting apparatus in his vehicle when conveying highly inflammable material or goods see *Ngedle v. Marine & Trade Insurance Co., Ltd.*, 1969 (4) S.A. 19 (T) (summarized *ante*, p. 238).

A fire broke out in a factory and it became necessary to call a fire-brigade; after its arrival an explosion took place injuring one of the firemen; it was decided that the factory owners were liable to him in damages since they should not have had their factory in that dangerous condition (*Merrington v. Ironbridge Metal Works, Ltd. and others* [1952] 2

All E.R. 1101). It is submitted that the same result would have ensured in our law on the basis of reasonable foreseeability of injury or damage.

FIRES IN URBAN PROPERTY

If negligence can be established in respect of the origin or the spread of a fire occurring in urban property, the negligent person will, without doubt, be liable for all consequences which are not too remote. But the difficulty of establishing such negligence is shown by the dearth of reported cases.

The Roman-Dutch authorities discuss at considerable length the question whether, when a fire occurs, a presumption of negligence arises against the occupier of the building. For the most part they tend to confuse the case of the lessee and the case of the stranger.

If the leased property is destroyed by fire, the onus is cast upon the lessee of showing that the destruction was *casus fortuitus*, i.e. that it occurred without fault on his part, and this is so particularly where the fire has originated **inside** the leased premises (*Daly v. Chisholm*, 1916 C.P.D. 562). This is in accordance with the usual rule in contracts *re*.

Where, however, the case lies between strangers, the position is otherwise. To the authorities cited by Voet (9.2.20) may be added Van Leeuwen (*Cens. For.*, 1.5.31.5) and Schorer (note to Grotius 3.8.4). In modern conditions, at any rate, it would appear that from the mere fact of a fire originating in a building, no inference of negligence on the part of the occupier or his servants will arise, though other facts may combine to raise the inference.

In *McLaughlin v. Koenig*, 1928 C.P.D. 102, Jones J. refused to hold that where a lodger in an hotel sued for damages caused by a fire originating inside the hotel, he was entitled to succeed without proving actual negligence or facts from which negligence might reasonably be inferred. It was also held that it was not negligence not to have provided a fire-escape for the building (four stories), the risk of fire not being sufficient to impose the duty.

Contracting out

For a case of contracting out of liability for a possible fire caused by a firm of fumigators, see *Hughes N.O. v. S.A. Fumigation Co. (Pty.) Ltd.*, 1961 (4) S.A. 799 (N). Here it was held that although the plaintiff had not signed the agreement in writing, nevertheless he was bound by the terms of which he was aware, but if the fire were deliberately caused by the contractor no exclusionary clause would relieve him from liability.

FIRE-ARMS

A fire-arm, being a highly dangerous article, should be handled only with the greatest care and should, it is submitted, never under any circumstances be pointed at anyone except in (a) self-defence, or (b) in warfare. The facts in the decision in *R. v. Ross*, 1940 N.P.D. 13, are illustrative of the degree of care required in this regard. In this case the accused had discharged a gun in the direction of the deceased, assuming him to be a poacher. The deceased was about 500 yards away at the time and the accused had fired in his direction aiming about 20 yards to the one side

of the deceased and another shot about 20 yards to the other side of him. The Native did not move and the accused on walking up had found, to his astonishment, that he was dead. The accused had not elevated his sight to 500 yards but had merely taken a full sight. Held, he had been negligent in the circumstances.

Again where, during a quarrel between a man and his wife he had produced a revolver and had shot into the air high above her head in order to frighten her into silence, but one of his sons, upon hearing the shot had rushed in and grabbed him from behind with the result that a further shot was fired while the gun was still in his hands, thereby killing his wife, it was held that he had rightly been convicted of culpable homicide (*R. v. Potten*, 1949 (4) S.A. 1042 (W)).

Children: Whether liability is incurred by a parent in respect of the negligent or inept use of fire-arms by a child, depends upon whether the parent should have reasonably have foreseen the consequences and whether he had taken reasonable precautions to prevent damage or injury (*S. v. Human*, 1962 (1) S.A. 860 (T)). It would not be sufficient for the parent merely to have instructed his son of 12 years not to take the gun off the farm and only to use it when there were no other children present (*Newton v. Edgerley* (Manchester Assizes, 17th July, 1959)). See, also, *Flowers v. Towers*, 1962 R. & N. 221 (F.S.C.), and *Donaldson v. McNiven* [1952] 2 All E.R. 691 (C.A.).

In *Wessels v. Ten Oever*, 1938 T.P.D. 26, appellant was the owner of a 12-bore shotgun which was kept unloaded in his garage. The cartridges were kept on a shelf in the garage in a tied-up cardboard box. This shelf could be reached by a tall man, but not by a child unless the latter climbed a three-foot bench underneath the shelf. The garage was kept locked by appellant who, however, knew that his son, aged 13 years, could get the key from his mother and thus obtain access to the garage. Appellant's son obtained possession of the gun and a cartridge and fired a shot into the ground in front of the minor son of the respondent, causing him injury from the pellets. Held, that appellant had taken reasonable precautions in regard to the shotgun and had not been negligent.

In *Bebee v. Sales*, 32 T.L.R. 413, on the other hand, the father gave his son an airgun and a neighbour had warned the father that the way in which the son used the gun was a source of danger. An accident occurred after the warning and it was held that the father had been negligent.

Where a parent had allowed his son aged 13 years to use an air-rifle and had taken precautions which, but for the son's disobedience (which could not have reasonably been foreseen) would have been adequate and reasonable, it was held that he had not been negligent (*Donaldson v. McNiven* [1952] 1 All E.R. 1213, and [1952] 2 All E.R. 691 (C.A.)).

Ricochet

As to what extent a person firing a rifle should anticipate a ricochet, the authorities are extremely meagre. Much will depend on the circumstances of each case, regard being had to (a) the nature of the object and background fired at, that is to say whether they are soft and receptive or hard and resilient and likely to deflect the course of the bullet, and (b) the angle of fire, since a bullet is less likely to be deflected when fired at right

angles at an object than when the bullet strikes the object at an acute angle. Regard must also be had to the presence, or the likelihood of the presence, of other persons in the locality who might be affected by a possible deflection of the bullet. In *Stanley v. Powell* [1891] 1 Q.B. 86, 60 L.J. Q.B. 52, it was held that the defendant who had fired at a pheasant was not liable for injury sustained by the plaintiff from a slug which had ricocheted from a tree between the defendant and the bird fired at. The matter came up for consideration in *Trimmel v. Williams*, 1952 (3) S.A. 786 (C), the facts of which were that the defendant had fired a .303 rifle bullet at a seal which was swimming towards him in the sea, some 5 yards away from him. He was standing up in his boat and the estimated height from which he fired was approximately 8 feet above the sea-level. The angle of fire was therefore about 35 degrees from the horizontal. Some 60 to 80 yards away, almost behind the seal, the plaintiff's deceased husband was also fishing in a fishing-boat. He was struck by the bullet, which deflected upwards and to the left, and died. Held, that the defendant had been negligent and was liable in damages inasmuch as although the possibilities of a ricochet of a bullet from a seal's head were remote they were not so remote that they should have been ignored by the defendant.

The law, therefore, requires the most stringent precautions in the control of dangerous weapons (*Roddy v. Ohlsson's Breweries*, 1907 T.H. 125). In this case plaintiff in a skittle-alley was injured by one of defendant's customers who was firing a rifle in an adjoining shooting-gallery and the Court held that the defendant had not exercised proper supervision over the shooting-gallery.

Spring guns

There is English authority (qualified by the Spring Guns Act, 1826) for the proposition that a trespasser who is injured by a spring gun, the presence of which he had received due notice, cannot recover for injury received (*Illott v. Wilkes* (1820) 3 B. & Ald. 304, 106 E.R. 674). This is based on the principle in that country that a trespasser comes on to another's property at his own risk and that no duty to exercise care towards him can be attributable to the owner or occupier of the land in question (Beven (4th ed.) pp. 543-4). As has been noted (*ante*, p. 199), if the presence of a trespasser can be anticipated, our law postulates a duty to exercise care not to injure him, unless the plea of **self-defence** can competently be set up. The matter came up for consideration by the Appellate Division in *Ex parte Minister of Justice: in re S. v. Van Wyk*, 1967 (1) S.A. 488 (A.D.), where a shopkeeper had suffered a number of store breakings into his premises and whose steps to prevent repetitions thereof had been ineffectual. Finally, with the knowledge of the police he posted up a notice on his shop door, in both official languages, stating that a shotgun had been placed in the shop and warning trespassers of the danger of unlawful entry. These deterrent steps were disregarded by an unlawful intruder who was shot and killed by the said shotgun, and the accused, having been acquitted by the trial court, the Minister sought a ruling of the Appellate Division on the point, and there that Court was of the opinion that the limits of self-defence had not been exceeded since the State had not proved that a less dangerous, yet effective, means could reasonably have been adopted by the shopkeeper to protect his property (at 515).

FISHERMEN

In casting a line into the sea, or other waters, care should be taken to see that no one in the near vicinity is likely to be injured in the exercise. In this regard it has been ruled that a four ounce sinker, designed to be propelled a considerable distance is, during the course of propulsion, a dangerous projectile and that the person casting such sinker, is under a legal duty to take care because he is performing an act which is intrinsically dangerous (*Sursathi v. Elliott*, 1963 (3) S.A. 233 (D)). In this case a man was killed and his natural wife and children succeeded in their claim for damages.

CHAPTER XIII

DAMAGES

SUMMARY

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GENERAL PRINCIPLES

Damages are sometimes said to be of three kinds, (a) nominal, (b) ordinary, and (c) exemplary. But in actions based on *culpa*, nominal damages do not fall to be awarded for, unless some actual damage is proved, the plaintiff's case fails (*Edwards v. Hyde*, 1903 T.S. 381); neither are exemplary damages granted since it is only in cases where the wrongful act contains some element of *contumelia* that this type of redress may be sought. Accordingly, only 'ordinary damages' need therefore be discussed.

The object of any award of damages, in an action based on *culpa*, is **compensation**: i.e. to put the plaintiff, from a pecuniary point of view, in the position in which he would have been but for the negligent act, a process conveniently described by the courts as *restitutio in integrum*. Every element of loss which has a calculable pecuniary value is included (unless it is too remote), but every element of personal attachment or affection is rigorously excluded (per Innes J. in *Union Govt. v. Warneke*, 1911 A.D. 657 at 662-3). Patrimonial loss only is recoverable. The only exception to this rule is the allowance of compensation for pain and suffering in actions, for personal injury. (See *Pitman v. Scrimgeour*, 1947 (2) S.A. 22 (W).)

Splitting of claims

The general rule is that, as between the same parties, one negligent act gives rise to one action for damages only. Consequently, when a negligent act causes damage a right of action under the *lex Aquilia* accrues immediately for all the damage flowing from such unlawful act, including prospective damage, reasonably anticipated, and that the plaintiff should include these **prospective** damages in his claim (*Oslo Land Co. v. Union Govt.*, 1938 A.D. 584; *Slomowitz v. Vereeniging Town Council*, 1966 (3) S.A. 322 (A.D.) at 331-2; *Lockhat's Est. v. North British and Marine Insurance Co.*, 1959 (1) S.A. 24 (O) at 27; *Administrator, Transvaal v. A.A. Mutual Insurance Assn., Ltd.*, 1960 (4) S.A. 525 (T) at 527; *Green v. Coetzer*, 1958 (2) S.A. 697 (W)). Thus, in *Green's* case it was ruled that a man who has obtained judgment for damages to his motor-cycle cannot thereafter bring an action for bodily injuries as a result of the same collision. It is advisable, therefore, not to be too hasty in bringing an action for damages (unless it would otherwise be barred by statutory prescription) (cf. *Coetsee v. S.A.R. & H.*, 1934 C.P.D. 221), until all the consequences of the injury can be ascertained or reasonably anticipated as prospective damages. In this regard the question arises as to prospective damages of a *problematical* nature, as where there may be a subsequent development of arthritic pains, necessitating an operation, in ten to fifteen years' time. In *Tonyela v. S.A.R. & H.*, 1960 (2) S.A. 68 (C) at 73, Rosenow J. said that if such development should eventuate it would be open to the plaintiff to pursue his claim for further compensation. In view of the aforementioned rule, however, this dictum would not appear to be correct. It is submitted therefore, that the court must find either that such problematical contingency constitutes a 'prospective damage' or else grant leave to the plaintiff to bring a further action in the event of its becoming a reality.

Damages must be directly caused by the negligence of the defendant,

and must not be *too remote*. These questions are discussed in dealing with Causation and Remoteness (see *ante*, pp. 77–94).

(a) PLAINTIFF MUST PROVE DAMAGE

The plaintiff must prove his damage. It follows that, in cases where damages are claimable on a mathematical basis, the courts will grant absolution if the necessary evidence, **although available**, has not been produced (*Hersman v. Shapiro*, 1926 T.P.D. 367 at 379–80; *Conradie v. General Accident Co.*, 1951 (1) P.H., J. 4 (A.D.)). It follows that the plaintiff must be alert to find and to produce all the available evidence at his command to substantiate his claim for damages to enable the court to make as accurate an assessment of his damages as possible (*Klopper v. Meloko*, 1930 T.P.D. 864 at 865; *Lazarus v. Rand Steam Laundries (1946) (Pty.) Ltd.*, 1952 (3) S.A. 49 (T); *Odendaalsrust G.G. Inv. Co., Ltd. v. Naude N.O.*, 1958 (1) S.A. 381 (T); *Rangeland, Ltd. v. Henderson*, 1955 (3) S.A. 134 (S.R.)).

Where evidence of damages is inadequate at the trial the court of appeal is entitled to remit the matter back for further evidence (see *Mossel Bay D.C. v. Oosthuizen*, 1933 C.P.D. at 511; *Modern Engineering Works v. Jacobs*, 1949 (3) S.A. 191 (T) at 194; *De Witt v. Heneck*, 1947 (2) S.A. at 427–8), and where plaintiff has made out a *prima facie* case it is not competent for the magistrate to grant absolution from the instance (*De Beer v. Bothma*, 1955 (1) S.A. 295 (T) at 297; *Van Schalkwyk v. Le Grange*, 1957 (1) P.H., J. 5 (O); *Coetzee v. Jansen*, 1954 (3) S.A. 173 (T). But see *Ward v. Steenberg*, 1951 (1) S.A. 395 (T)).

Actuarial evidence

While actuarial evidence is allowable, the court is not necessarily and inexorably bound by the valuation of the actuary, since it is at large to come to its own conclusions thereon (*Legal Insurance Co., Ltd. v. Botes*, 1963 (1) S.A. 608 (A.D.) at 614 and see also *post*, pp. 266 and 373).

(b) DAMAGES ON NECESSARILY CONJECTURAL BASIS

In certain cases, however, where all the material evidence available to the plaintiff has been placed before the court and where no better evidence is available to him, and he has proved some monetary loss, the court will sometimes assess the damages as best it can on the evidence available, as in *Davies v. Crossling*, 1935 W.L.D. 107, and *Conradie v. General Accident Co.*, 1951 (1) P.H., J. 4 (A.D.). Thus, where plaintiff led insufficient evidence as to loss of future earnings, the Court by consent sent the case to an arbitrator. Again in *Mossel Bay D.C. v. Oosthuizen*, 1933 C.P.D. 509, the case was sent back for further evidence as to the damages, to the car and of loss of earnings, subject to the plaintiff paying the costs. But such acts of indulgence by the court are rare, and the plaintiff should take pains to produce all available evidence.

Where by the nature of the case damages must be assessed on a somewhat conjectural basis, as in the action by dependants, the rule as to proving damage will, of course, be less strictly applied (see *Arendse v. Maher*, 1936 T.P.D. at 165). In this case plaintiff produced no evidence as to expectation of life of the deceased, and the Court estimated the

damage as best it could, intimating that the effect of the lack of evidence would be to the detriment of the plaintiff. In *Rawles v. Barnard*, 1936 C.P.D. at 79, Davis J. applied the remarks of Stratford J. in *Turkstra v. Rickards*, 1926 T.P.D. at 283, that

'where there is a finding or admission that damage has been caused in a monetary amount, the court must do its best to assess the amount on such evidence as is available, and you cannot non-suit the plaintiff because, in the nature of things, the damage cannot be computed in exact figures.'

But here, too, such evidence as is available should clearly be produced.

On appeal: The assessment of damages is largely in the discretion of the trial judge and the court of appeal is, accordingly, reluctant to interfere with such order unless (a) there is a considerable disproportion in the quantum of damages awarded or (b) they have been awarded on an improper basis (*Legal Insurance Co. v. Botes*, 1963 (1) S.A. 608 (A.D.); *Norwich Union Fire Insurance Co. v. Tutt*, 1960 (4) S.A. 851 (A.D.) at 854; *Swart v. Provincial Insurance Co., Ltd.*, 1963 (2) S.A. 630 (A.D.); *Parity Insurance Co. v. Van den Bergh*, 1966 (4) S.A. 463 (A.D.), and *Bruwer v. Joubert*, 1966 (3) S.A. 334 (A.D.) (material factors overlooked)).

Loss of wages

If a person has been paid his wages during the time he was incapacitated he can, nevertheless, claim their amount from the defendant if his employer was under contract to pay such wages or else did so out of his magnanimity (*Bosch v. Parity Insurance Co.*, 1964 (2) S.A. 449 (W) at 452-3, following *Henning v. South British Insurance Co.*, 1963 (1) S.A. 272 (O), and dissenting from *Van Heerden v. African Guarantee and Indemnity Co.*, 1951 (3) S.A. 730 (C); see also *post*, pp. 254, 264).

(c) DUTY TO MINIMIZE

The duty of the plaintiff to minimize damages applies in delict as well as in contract. Thus in *Attorney-General v. Valle-Jones* [1935] 2 K.B. at 219, it was said (following *The Amerika* [1917] A.C. at 42) that the plaintiff cannot recover damages which he has 'unnecessarily and unreasonably incurred or inflated'. In *Butler v. Durban Corporation*, 1936 N.P.D. at 148, it was contended that the plaintiff should undergo an **operation** in order to minimize his damage; but the Court, applying *Kinemas, Ltd. v. Berman*, 1932 A.D. 246, ruled that it was clear that the onus was on defendant to prove (a) that the plaintiff could so minimize his damage, and (b) that it was unreasonable for him not to undergo the operation, and decided that, on the facts, the onus had not been discharged. But if it is established that an operation would improve the plaintiff's condition, that fact must surely operate to reduce damages. Such proof does not necessarily throw a duty on the plaintiff to undergo the operation but merely serves to modify his claim. (See also *Hazis v. Transvaal & Delagoa Bay Inv. Co.*, 1939 A.D. at 388; *Butler v. Durban Corporation*, 1936 N.P.D. 139; *Wilhelm v. Norton*, 1935 E.D.L. 143; *Lampakis v. Dimitri*, 1937 T.P.D. 138.) In the *Guilford* case [1956] 2 All E.R. 915 (P.D.), it was held that the refusal of the offer by the defendant ship to tow the plaintiff ship to safety in a dark, foggy night was not unreasonable. Again, a schoolboy cannot be said to have failed to mitigate his damages by reason of the fact that he

declined to go back to school and thereby obtain better qualifications (*Swart v. Provincial Insurance Co.*, 1963 (2) S.A. 630 (A.D.)); nor is a widow obliged to mitigate her loss of support from her husband by going out to work (*Peri-Urban Areas Health Board v. Munarin*, 1965 (3) S.A. 367 (A.D.)).

The onus of establishing a failure to mitigate damages resting on the defendant is illustrated in *North & Son (Pty.) Ltd. v. Albertyn*, 1962 (2) S.A. 212 (A.D.), where Van Blerk J.A. at 216 said:

'Eiser kan alleen sodanige skade verhaal as wat hy deur redelike voorsorgmatreëls nie kon verhoed nie, maar die bewyslas dat hy versuim het om skade te temper rus op verweerder.'

See, also, *Dykes v. Gavanne Investments (Pty.) Ltd.*, 1962 (1) S.A. 16 (T) at 18; *Shrog v. Valentine*, 1949 (3) S.A. 1228 (T) at 1237.

The amount of compensation to be paid to an injured person by an insurance company under section 11(1) of the Motor Vehicle Insurance Act, 1942, is not to be reduced where the physical injury suffered has disturbed that person's **nervous system**, merely because another person suffering from the same disturbance of nervous system in the same circumstances would be able to control his nerves more easily and would recover more quickly than the injured person. An insurance company may be liable to pay more compensation in the one case than in the other. The question for the court is fundamentally one of fact, namely, does it find that the injured person suffered as he and his witnesses say he did? (*Marshall v. Southern Insurance Assoc., Ltd.*, 1950 P.H., J. 6 (N)). (See also *post*, pp. 264-5.)

A person is entitled to recover expense to which he has been put in minimizing the damage sustained. This would include the expenditure for towing a damaged vehicle to a repair shop notwithstanding the fact that it subsequently appears that the vehicle could have proceeded under its own power (*Shrog v. Valentine*, 1949 (3) S.A. 1228 (T)).

Consequential damages

Under this head it has been ruled that the air-fare of a relative of a person, injured and still unconscious, was allowable, since otherwise the relatives would have had to engage the services of a fully qualified nurse to attend to him and also to arrange for the transport of his body back home (*Schneider v. Eisovitch* [1960] 1 All E.R. 169 (Q.B.)).

(d) FREE SERVICES

It not infrequently happens that the plaintiff, for one reason or another, is entitled to receive free medical or hospital treatment, or is given free board and lodging, or for some similar reason is not put to actual expense which would otherwise be occasioned by the injury. Does this fact minimize the extent of the defendant's liability? The answer is that it does not; usually because the person who in fact gives the free services has a legal right to be reimbursed, or because the 'free' services have, in fact, been paid for in some other way for his injuries and the claim would be competent even if the plaintiff was retained in an institution at state expense (*Roberts N.O. v. Northern Assurance Co., Ltd.*, 1964 (4) S.A. 531 (D)). Thus, in *Van der Westhuizen v. Du Preez*, 1928 T.P.D. 45, the plaintiff

recovered damages for medical and hospital attendance, though he was entitled to have them paid out of the Railway Sick Fund; and for loss of salary though he received sick pay; Greenberg J. remarking that as he had made contributions out of his salary towards these funds in past years, the defendant could not validly set up that fact for the purpose of reducing the plaintiff's claim (*Klingman v. Lovell*, 1913 W.L.D. 186; *Bosch v. Parity Insurance Co., Ltd.*, 1964 (2) S.A. 449 (W)). The principle underlying this rule is that social policy demands that the wrongdoer should not be allowed to benefit by the fact that the plaintiff's loss has been compensated by some source collateral to the wrong (McKerron in (1951) 68 S.A.L.J. at 373), i.e. where there is some *res inter alios acta* on behalf of the plaintiff (*Du Randt v. Eriksen Motors (Welkom) Ltd.*, 1953 (3) S.A. 570 (O) at 572). It is submitted therefore that the decision in *Van Heerden v. African Guarantee and Indemnity Co.*, 1951 (3) S.A. 730 (C), does not correctly state the true legal position. (See Loss of Wages below and *post*, p. 264, and also *Morris v. African Guarantee and Indemnity Co., Ltd.*, 1964 (4) S.A. 747 (W) at 749.) Consequently the amount recouped by a plaintiff by way of past board and lodging, given to him by his parents, as an act of affection and charity, are not deductible from the quantum of damages claimed by him from a defendant (*Klingman v. Lowell*, 1913 W.L.D. 186 (per Curlewis J.)). In *The Mediana* [1900] A.C. 113 it was ruled that the plaintiff was entitled to recover for the disabling of its ship even though in fact another ship owned by it was employed in its place without actual monetary cost to the plaintiff.

(e) WAGES AND SICK LEAVE

Sick leave benefits accruing to the plaintiff are 'deemed to have been purchased' by him by virtue of his contract with his employer and, as such, the defendant may not claim a deduction thereof from the damages to be awarded to the plaintiff (*Bosch v. Parity Insurance Co., Ltd.*, 1964 (2) S.A. 449 (W) at 453, and *May v. Parity Insurance Co., Ltd.*, 1967 (1) S.A. 644 (D) at 647)).

If, however the plaintiff has received compensation from the Commissioner under the Workmen's Compensation Act, that amount falls to be deducted from the damages claimable, since the Commissioner is entitled to claim from the defendant what he has paid to the plaintiff (*Henning v. South British Insurance Co., Ltd.*, 1963 (1) S.A. 272 (O) at 294; *Van der Westhuizen v. S.A. Liberal Insurance Co.*, 1949 (3) S.A. 160 (C) at 176; *Bonheim v. South British Insurance Co., Ltd.*, 1962 (3) S.A. 259 (A.D.) at 267; *Scheepers v. African Guarantee and Indemnity Co.*, 1962 (3) S.A. 657 (E); *Botha v. Miodownik*, 1966 (3) S.A. 82 (W)).

Wages: The fact that an employer has, as an act of generosity, paid to his employee (plaintiff) his salary during a period when he was off duty as a result of injuries sustained in an accident, is irrelevant to the latter's claim for damages against the person responsible for the accident (*Major v. Yorkshire Insurance Co.*, 1949 (1) P.H., J. 1 (D)). The contrary decision of Van Zyl J. in *Van Heerden v. African Guarantee and Indemnity Co., Ltd.*, 1951 (2) S.A. 730 (C), has been criticized in (1951) S.A.L.J. 372 and (1956) S.A.L.J. 50 and, it is submitted, is not correct. It did not find support either in *Bosch's* case (*supra*) or in *Morris v. African Guarantee and*

Indemnity Co., Ltd., 1964 (4) S.A. 747 (W) at 749, in which it was held that it is immaterial whether the employer was contractually bound to pay such wages during the employee's absence on account of the accident or whether he paid same as an act of generosity. See also Luntz in (1964) 81 S.A.L.J. at 288-93 and 516; *May v. Parity Insurance Co.* (*supra*); *Du Randt v. Eriksen Motors (Welkom) Ltd.*, 1953 (3) S.A. 570 (O) at 572; *Van der Westhuizen v. Du Preez*, 1928 T.P.D. 45 at 47; and see also *Annual Survey*, 1964, pp. 166-7.

(f) INSURANCE POLICIES

The fact that a plaintiff has taken the precaution to insure himself against damage does not entitle the defendant to seek to deprive him of his right to judgment for damages caused by the latter, since this is also *res inter alios acta* (*McKenzie v. S.A. Taxi-Cab Co.*, 1910 W.L.D. 232), although the plaintiff may, by his agreement with his insurance company, be obliged when compensated by the latter to hand over the moneys received from the defendant (*Ackerman v. Loubser*, 1918 O.P.D. 31). See also *Chi and another v. Lodi*, 1949 (2) S.A. 507 (T); *Van Dyk v. Cordier*, 1965 (3) S.A. 723 (O). Nor is it competent for the court to deduct the amount of insurance premiums, which the deceased would have paid had he lived, from the total assessed loss (*Groenewald v. Snyders*, 1966 (3) S.A. 273 (A.D.) at 247-8). See also Hoyrood in (1958) 75 S.A.L.J. 77-81 and *post*, p. 275.

If, however, plaintiff's rights have already been **ceded** to his insurance company, then the defendant will be liable to the insurance company only (*Van Dyk's case* (*supra*); *Teper v. McGee's Motors (Pty.) Ltd.*, 1956 (1) S.A. 738 (C) at 739, and *Chi's case* (*supra*)).

Previously, in an action by the dependants of the deceased the accelerated value of insurance moneys due had to be taken into account in abatement of damages (*Legal Insurance Co., Ltd. v. Botes*, 1963 (1) S.A. 608 (A.D.) at 620, but now, under section 1 of Act No. 9 of 1969, this decision is no longer applicable (see *post*, pp. 275-6)). Moreover, the fact that the widow of the deceased happens to be better off financially as a result of his death does not debar her children from claiming their own loss of support (*Groenewald v. Snyders* (*supra*) and see *Boberg* in (1966) 83 S.A.L.J. 402 and also *post*, p. 270).

Unless Act No. 29 of 1942 is relied upon the plaintiff's declaration is excipiable since, as there is no *vinculum juris* between an insurer and the passengers of the car, the latter would have no grounds of action the company in the event of injury being sustained while riding in the car of the insurer, but only against the wrongdoer (*Van der Merwe v. S.A. Nasionale Trust en Ass. My.*, 1947 (2) S.A. 440 (C)). In this case the daughter of the plaintiff sustained damages owing to a collision between two cars insured by the first and second defendants respectively, it being averred that the damages were caused by the negligence of the drivers of both cars concerned. Held, that there was no cause of action.

(g) DEVALUATION IN VALUE OF MONEY

A factor which the court is entitled to take into consideration, especially in comparing compensation awarded on previous cases, is the devaluation of the pound (*Norton v. Ginsberg*, 1953 (4) S.A. 537 (A.D.)). Consequently,

in making an award, the court is entitled to take into account the continued downward trend in the value of money for the next thirty years (*Legal Insurance Co. v. Botes*, 1963 (1) S.A. 608 (A.D.) at 619).

(h) LOCUS STANDI OF PLAINTIFF TO SUE

The decisions in this regard are somewhat confusing but, nevertheless, it appears that before a person can claim for damages suffered by him in respect of property in his possession, he must have had some real right *in rem* thereto as opposed to some right *in personam* derived from some contract or agreement giving rise to that right. Thus it has been held that the possession of a vehicle acquired under a hire-purchase agreement affords the purchaser a competent right to sue for damages done to that vehicle (per Davis J. in *Spolander v. Ward*, 1940 C.P.D. 230). Accordingly, while by virtue of a contract of sale the *periculum*, or risk of damage, to the thing sold passes to the purchaser immediately upon the acceptance of the offer yet, while the seller is still in possession thereof, he is entitled to sue a tortfeasor for damages caused by the latter to the *res* owing to his negligence (*Van Wyk v. Herbst*, 1954 (2) S.A. 571 (T)).

In *Hudson's Transport (Pty.) Ltd. v. Du Toit*, 1952 (3) S.A. 726 (T), it was held that the purchaser of a motor vehicle, acquired without a certificate of roadworthiness, would not be entitled to sue for damages done to it until he had obtained such certificate since the validity of the sale, and possession, is dependent upon the issue of that document. See, also, *Kruger v. Fourie*, 1946 T.P.D. 155, and *Vardy v. Van der Westhuizen*, 1952 (2) S.A. at 349-50. All these decisions have now been overruled by *Pottie v. Kotze*, 1954 (3) S.A. 719 (A.D.) at 728.

On the other hand a right *in personam* giving a person the right to harvest crops on land gives him no legal entitlement to sue another for negligence when the former is no longer in possession of such land (*Kruger v. Strydom*, 1969 (4) S.A. 307 (N)).

APPORTIONMENT OF DAMAGES

The main principles and considerations relating to the apportionment of damages have already been noted (*ante*, p. 66) and, in regard to the relative degrees of blameworthiness, it is doubtful whether any particular set of circumstances in one trial can be found to be equated with all the facts and circumstances of another trial to the extent of forming a criterion as to the proper award to be made in any other subsequent case. Assistance, in some respects, may however be had from the following decisions:

Norwich Union Fire Ass. Society, Ltd. v. Tutt, 1960 (4) S.A. 851 (A.D.): Award reduced on appeal where a motorist had run into a pedestrian at a pedestrian crossing.

Stolp v. Du Plessis, 1960 (2) S.A. 661 (T): Where plaintiff was negligent in driving on the incorrect side of the road and defendant was also negligent in failing to keep a proper look-out: Held, plaintiff was one-third negligent and defendant two-thirds at fault.

Woods v. Administrator, Transvaal, 1960 (1) S.A. 311 (T): A slow-moving motor vehicle turning suddenly when being overtaken into the way of an oncoming plaintiff who had not reduced his speed: Held, plaintiff was entitled to recover to the extent of 25 per cent.

Tonyela v. S.A.R. & H., 1960 (2) S.A. 68 (C): The court cannot be debarred by the niceties of pleading from applying the Act where the matter has been fully canvassed at the trial and the defendant could not have been prejudiced by an amendment to the pleadings. Overtaking driver failing to allow sufficient space in overtaking a horse-cart, the driver of which turned without warning: Held, the degree of negligence was 75 per cent and the lorry-driver's negligence was 25 per cent.

Celliers v. S.A.R. & H., 1961 (2) S.A. 131 (T): Plaintiff was awarded three-quarters of his damage after colliding with a train in a built-up area where insufficient warning of the approach of the train had been given.

Bhyat's Store v. Van Rooyen, 1961 (4) S.A. 59 (T): Where a driver had run into and killed sheep on a country road at night-time, the plaintiff's herd was found to be 80 per cent blameworthy.

Bonheim v. South British Ins. Co., Ltd., 1962 (3) S.A. 259 (A.D.): Where a head-on collision occurred between a motor-cyclist and a motor vehicle driver, the Court assessed the blameworthiness of the motorist at 25 per cent and 75 per cent to the motor-cyclist.

South British Ins. Co., Ltd. v. Smit, 1962 (3) S.A. 826 (A.D.): Where a boy of 10 years had run across a road without looking and into the way of a motor-cyclist the Court held that his fault was to be estimated at 70 per cent.

Prinsloo v. Giradin, 1962 (4) S.A. 391 (T): Where plaintiff had run into and killed defendant's cattle, it was held that the magistrate's apportionment of blame at the ratio of 60 for plaintiff and 400 against defendant was not incorrect.

General Tyre & Rubber Co. (S.A.) Ltd. v. Kleynhans and another, 1963 (1) S.A. 533 (N): Where both drivers were held to be at fault the moral blameworthiness was assessed at 50 per cent for each.

Jones N.O. v. Santam, Bpk., 1965 (2) S.A. 542 (A.D.): Where a motorist collided with a child whom he should have seen some three feet off the road before the accident and who ran into the road in front of his vehicle it was held that there was a 50 per cent deviation from the norm of care on the part of both persons.

S.A.R. & H. v. Reed, 1965 (3) S.A. 439 (A.D.): Where a pedestrian stood too close to a railway-line at a road crossing in a rural area, the decision of the court below was reversed into one of absolution from the instance.

Venter v. Dickson, 1965 (4) S.A. 22 (E): Where a motorist negligently reversed from a private entrance into a highway, his negligence was assessed at 60 per cent and the appellant's at 40 per cent for not seeing the car earlier than he did.

Laszczyk v. National Coal Board [1954] 3 All E.R. 205: Breach of statutory duty by employers in a coal-mine; and also breach of statutory directions by employee, but he was acting under orders of his immediate superior. Held, his negligence was small and therefore the proportion of damages attributed to him was 5 per cent.

Davies v. Swan Motor Co., Ltd. [1949] 1 All E.R. 620: Claim by wife of deceased who had negligently stood on the steps of the lorry. Held, that lorry-driver in turning across a road without making use of his mirror was one-third negligent, and the omnibus driver who attempted to overtake on a bend in a narrow road was two-thirds liable.

Cork v. Kirby Maclean, Ltd. [1952] 2 All E.R. 402: Plaintiff employee negligent in failing to inform defendant that he was liable to epileptic fits. Defendant negligent in failing to provide guard-rails on platform on which plaintiff was working. Held, plaintiff's damages must be reduced by one-half.

Jay & Sons v. Veevers, Ltd. [1946] 1 All E.R. 646: Defendant was negligent in failing to keep a proper look-out. Plaintiff was negligent in emerging from a side road into a main road. Proportion of damages awarded to plaintiff was one-third.

Cakebread v. Hopping Bros. [1947] K.B. 641: Defendant was negligent in failing to adjust a guard on machinery. Plaintiff was negligent in also failing to adjust the guard. Held 50 per cent damages should be awarded plaintiff.

Henley v. Cameron (1948) 65 T.L.R. 17: Defendant was negligent in leaving a car on a highway at night without lights while plaintiff was negligent in failing to keep a proper look-out. Held, that two-thirds damages should be awarded to plaintiff.

Johnson v. Croggon & Co. [1954] 1 All E.R. 121: Plaintiff used ladders of inferior strength after being instructed to get proper ladders from P & Co. Held, defendants were not negligent and that plaintiff could not recover damages.

Stapley v. Gypsum Mines, Ltd. [1953] 2 All E.R. 478: Deceased entered the working of a stope in a mine negligently and before it had been made secure. Held, defendants were liable for 20 per cent of his damages.

DAMAGE TO CHATTEL

(a) ACTUAL LOSS

Where a chattel is destroyed, the damage is 'its value as a going concern at the time and place of the loss' (*S.S. Edison* [1933] A.C. 449). This will normally be the cost of replacement at that place. In other words, the damages claimable are the resulting diminution in value of the chattel (*Witwatersrand G.M.C. v. Cowan*, 1910 T.P.D. 314). Thus, where a ship is damaged while being handled on a slipway or graving-dock the defendant will be liable for the actual damage sustained and also for the cost of getting the ship clear of the slipway or dock (*Gifford v. Table Bay Docks*, 1874 Buch. 96, and *Wimble v. De Pass*, 4 S.C. 187), and where a person claims damages for loss of lateral support the amount granted should include the cost of putting the injured building in repair, or, where there has been a total loss, the entire value of the structure destroyed (*C.S.A.R. v. Geldenhuys G.M.C.*, 1907 T.H. 270). Where a mine was flooded owing partly to negligence and partly to natural causes, the damages granted were made proportionate to the amount penetrating through negligence (*New Heriot G.M. Co. v. Union Govt.*, 1916 A.D. 415). For the negligent flooding of a store the plaintiff is entitled to the value of the damaged goods therein.

(b) PROOF OF DAMAGES

There appear to be three different modes of establishing the loss suffered by a plaintiff whose motor vehicle or other property has been damaged (*Du Plessis v. Nel*, 1961 (2) S.A. 97 (G.W.)), and these may be set out as follows:

- (i) By proving the **difference in value** of the vehicle, having regard to its market value immediately before the accident and its market value thereafter (*G. & M. Builders' Supplies (Pty.) Ltd. v. S.A.R. & H.*, 1942 T.P.D. 120; *Janeke v. Ras*, 1965 (4) S.A. 583 (T) at 587). This usually applies where the thing has been irreparably damaged (*Du Plessis's* case (*supra*) at 101). But the evidence in value should be more than a vague or speculative estimate or assessment (*Lazarus v. Rand Steam Laundries, Ltd.*, 1952 (3) S.A. 49 (T) at 53). This is not always easy of proof for, apart from expert evidence the plaintiff will have to show (a) what the original cost was, and (b) what the depreciation was on the property up to the time of the damage (*West Rand Steam Laundry, Ltd. v. Waks*, 1954 (2) S.A. 394 (T), and *Lazarus's* case (*supra*)); although a failure to cross-examine and challenge plaintiff's estimate will be taken as an acceptance thereof (*Paola v. Hughes (Pty.) Ltd.*, 1956 (2) S.A. 587 (N) at 596).

Where the plaintiff had based his claim on a reduction in value of his motor vehicle and had established the pre-collision value thereof

but had failed to adduce evidence of its post-collision value the Court held that the evidence of the cost of repairs (upon which there had been no cross-examination) could be taken into consideration in estimating the reduction in value of the damaged vehicle (*Erasmus v. Davis*, 1969 (2) S.A. 1 (A.D.)).

- (ii) By proving the **cost of repairs**, provided that the plaintiff's evidence shows that they were both (a) *fair* and *reasonable* and (b) *necessary* (*Ward v. Steenberg*, 1951 (1) S.A. 395 (T) at 403; *Shrog v. Valentine*, 1949 (3) S.A. 1228 (T) at 1235; *Klopper v. Maloko*, 1930 T.P.D. 860 at 864). The repairs must have been necessary to bring the car into its pre-collision condition (*De Witt v. Heneck*, 1947 (2) S.A. 423 (C); *Lock v. S.A.R. & H.*, 1919 E.D.L. 212; *Van Dyk v. Cordier*, 1965 (3) S.A. 723 (O)). This method of assessment of damages was doubted in *Enslin v. Meyer*, 1960 (4) S.A. 520 (T) at 523, but such dictum was qualified in *Jenke v. Ras*, 1965 (4) S.A. 583 (T) at 588. See also *Du Plessis's* case (*supra*). Certainly it is not sufficient for the plaintiff merely to produce an *account* from his garage for the amount claimed (*Scrooby v. Engelbrecht*, 1940 T.P.D. 100), but he should give details of the damage suffered as reflected in the account produced by him (*Hugo v. Rossouw*, 1946 C.P.D. 54). This can best be done by calling as a witness, the person who effected the repairs to show what was done and also to prove his charges are fair and reasonable (*Paarl Transport Services v. Du Toit*, 1946 C.P.D. 189). The cost of repairs would include the cost of second-hand parts, as well as the mechanic's labour (*De Beer v. Bothma*, 1955 (1) S.A. 295 (T)).

While it is necessary to prove the reasonableness and necessity of the repairs, it is not obligatory upon the plaintiff to aver these pre-requisites in his declaration (*Botha v. Van Zyl*, 1955 (3) S.A. 310 (S.W.)).

In *Boshoff v. Erasmus*, 1953 (1) S.A. 103 (T), it was held that where the plaintiff had handed in a copy of his account showing the items of repair and the amounts charged for each but had failed to prove the reasonableness of the charges, the fact that he had produced two earlier tenders for larger sums was sufficient proof that the repair costs were in fact reasonable. Moreover, while the defendant may challenge the account of repairs by showing that some items are excessive and are therefore subject to a deduction, there may be other items of charges which are on the low side and, therefore, what has to be considered is whether the total amount is reasonable in order to put the vehicle into the condition it had been before the accident (*Field Engineering & Clearing Corp'n. of S.A. (Pty.) Ltd. v. Polliack & Co.*, 1948 (4) S.A. 312 (T) at 315).

Naturally the plaintiff must prove that the repairs effected were actually caused in the collision complained of, i.e. were not due to some other or prior accident (cf. *Scrooby v. Engelbrecht*, 1940 T.P.D. 100 at 203; *G. & M. Builders' Supplies (Pty.) Ltd. v. S.A.R. & H.*, 1942 T.P.D. 120 at 121).

- (iii) By proving the **depreciation value** of the vehicle or article concerned (*Du Plessis v. Nel*, 1961 (2) S.A. 97 (G.W.) at 101), when it is not necessary to have the vehicle or thing actually repaired. Moreover

plaintiff may come to court to prove that, notwithstanding the repairs, it is still not in the same condition which it was before the damage was inflicted, since an extensively damaged car, even though repaired, can seldom be in as good a condition as it was before the damage (*Page v. Lyon*, 1938 E.D.L. 235 at 242). Where repairs have not been effected, one must normally rely upon the estimate of a person who is *prima facie* experienced in the trade and one who is entitled to say what he estimates would be the cost or proper expenditure necessary to bring the vehicle into its pre-collision condition (*De Beer v. Bothma (supra)* at 297).

Towing costs. Included in the actual loss suffered is the cost of towage (*Shrog v. Valentine*, 1949 (3) S.A. 1228 (T) at 1234; *Ward v. Steenberg*, 1951 (1) S.A. 395 (T) at 397, and *De Witt v. Heneck*, 1947 (2) S.A. 423 (C) at 427).

Loss of income may be claimed as a direct and actual loss where the damaged vehicle was used in the plaintiff's business (*Shrog v. Valentine*, 1949 (3) S.A. 1228 (T)), as for instance where the plaintiff is a taxi-driver (*Mossel Bay D.C. v. Oosthuizen*, below), but in such case he must adduce evidence as to his average daily income and the time it took to repair the car, or else how long it would ordinarily take to repair the car (*ibid.*).

Transportation costs. Where plaintiff claims for expenses incurred in getting to and from his place of employment while his car is under repair, he cannot simply claim a round sum for the loss of the use of his car but must prove the actual expenses incurred (*Van Schalkwyk v. Le Grange*, 1957 (1) P.H., J. 5 (O)).

Cattle. Unless the valuation of cattle killed in a collision is challenged, non-expert evidence by the owner thereof of their value is sufficient to establish his claim (*Bondcrete, Ltd. v. City View Investments, Ltd.*, 1969 (1) S.A. 134 (N) at 136).

(c) LOSS OF PROFITS

Generally speaking, damages will include not only *damnum emergens* but also *lucrum cessans*. Where, therefore, a vehicle which is damaged through the negligence of another has been in use in the business of its owner, the damages which can be recovered—apart from the cost of repairs—include the loss of income to the owner due to the loss of the use of the vehicle (*Shrog v. Valentine*, 1949 (3) S.A. 1228 (T)). A person is entitled to recover expense to which he has been put in minimizing the damages (*ibid.*). Loss of profits owing to deprivation of the use of a vehicle are not required to be reasonable (*ibid.*, *sed quaere*). See *Mossel Bay D.C. v. Oosthuizen*, 1933 C.P.D. 509; *Modern Engineering Works v. Jacobs*, 1949 (3) S.A. 191 (C), for where the plaintiff avoids that loss by hiring a vehicle to replace the damaged vehicle, the defendant is liable for the expense thus incurred unless he can show that the action of that plaintiff in hiring a vehicle at all, or in hiring one at that cost, was quite unreasonable (*ibid.*) (see also *Lock v. S.A.R.*, 1919 E.D.L. 212). Compare, however, *Metropolitan Tramways v. Stubbs*, 1924 C.P.D. 446.

In regard to damage done to agricultural soil by flooding owing to the negligence of the defendant, the measure of damage is the loss of the crops and the profit the latter would have made thereon, also the expenses

entailed in replacing the denuded land with the same quality of land and soil which has been washed away (*Witwatersrand G.M. Co. v. Cowan (supra)*).

In dealing with the question of profits the court will be guided by the circumstances of each case and it seems that actual, in contradistinction to potential, or possible, profits will have to be properly proved (*Mossel Bay D.C. v. Oosthuizen*, 1933 C.P.D. 509). Where, for instance, a chattel, such as a ship under charter which is actually in profitable employment, has been destroyed, the calculated damages will be awarded (*S.S. Edison* [1933] A.C. 449).

Where loss of profits is claimed the actual loss must be strictly proved (*Modern Engineering Works v. Jacobs*, 1949 (3) S.A. 191 (T)), that is to say, one must show the work that would have been done in the time lost with the profit that would have flowed during that time (*ibid.*) (see also *Nathan on Damages*, p. 165). The right to this damage is not affected by the fact that the damaged vehicle has been replaced by another (*Mayne on Damages*, p. 73), nor by the fact that another vehicle has been loaned to plaintiff by a friend of his (*G. & M. Builders' Supplies (Pty.) Ltd. v. S.A.R. & H.*, 1942 T.P.D. 120).

DAMAGE TO HOUSE

In the case of *Eunson v. Port Elizabeth Municipality*, 1933 E.D.L. at 241, Gane J. citing Sutherland, 3rd ed., vol. 4, secs. 1017-18, 1049, said, *obiter*, that the true criterion for damage to house and property is the expense of restoring it to the old condition, or else the reduced value of the property, whichever is the lesser. The action is not confined to the owner, but can be brought by the usufructuary, the pledgee, the lessee, or even the depositary (Voet 9.2.10), provided damage can be shown to the rights which such party has in the property (see *Cradock Municipality v. Philips*, 1938 E.D.L. 382). The measure of damage will then be the diminution in value of the right, together with any necessary expense; or if there is liability, to restore to the owner in good repair and condition the full amount falling due in respect of that liability (*Bower's case*, 7 E.D.C. 211). If plaintiff is compelled to leave the house he may be entitled to compensation for loss of amenities (*Eunson's case*), and he will certainly be entitled to any necessary expense such as board and lodging. As to loss of profits, no doubt the rule is the same as in the case of a vehicle. But where the claim is for loss of boarders, it must be shown that the damage compelled the boarders to leave (*Perlstein's case*, 12 C.T.R. 668).

DAMAGE TO CROPS

Damage to crops was assessed in *Oates v. Union Govt.*, 1932 N.P.D. 198, at the cost of replacement (apple orchard) plus loss of profits until the new trees would come into bearing. (Compare *Versveld v. S.A. Citrus Co.*, 1930 A.D. at 454, a case on contract.)

DAMAGES FOR PERSONAL INJURY

(a) TO ONESELF

The general principles, in relation to compensation payable for injuries negligently inflicted on oneself personally have been laid down in a number

of decisions, including *inter alia*: *Union Govt. v. Clay*, 1913 A.D. 385; *Jones v. Wilcocks*, 1935 N.P.D. 121; *Van der Westhuizen v. Du Preez*, 1928 T.P.D. 45; *Dale v. Hamilton*, 1924 W.L.D. 184; *Oosthuizen v. Thompson*, 1919 T.P.D. 124, and *Lentzner v. Friedman*, 1919 O.P.D. 20; *Pitman v. Scrimgeour*, 1947 (2) S.A. 22, to the effect that the plaintiff is entitled to compensation for both pecuniary and non-pecuniary loss such as:

- (a) All necessary expenses such as **medical and hospital attention**, including any increase in expenditure necessary on account of disablement, such as a medical specialist (*Lentzner v. Friedman*, 1919 O.P.D. 20). The fact that the plaintiff's employer has gratuitously paid his medical expenses does not relieve the defendant of his liability therefor (*Morris v. African Guarantee and Indemnity Co., Ltd.*, 1964 (4) S.A. 747).
- (b) Loss of **future earnings**, that is to say, compensation for the impairment of one's power to earn a living (*Marfuggi v. Queensland Insurance and another*, 1959 (3) S.A. 888 (S.R.) at 893). Before a plaintiff can recover on the basis of permanent injury he will have to prove that there is no reasonable prospect of his recovery (*Harmsworth v. Smith*, 1928 N.P.D. 174; *Roddy v. Ohlsson's Breweries*, 1907 T.S. 125). He can also claim for loss of earnings after his retirement at the age of 63, and up to the age of 70 years, if he established that he intended to return to work to supplement his pension (*Bosch v. Parity Insurance Co.*, 1964 (2) S.A. 449 (W)). See also *Goldie v. Johannesburg C.C.*, 1948 (2) S.A. 918 (W), and (1965) 82 S.A.L.J. 4571. But, where a plaintiff fails to plead loss of earnings after retirement, his claim can not succeed (*Rondalia Versekeringskorporasie van S.A. v. Pretorius*, 1967 (2) S.A. 649 (A.D.)).

Such claim for future earnings may be subjected to a deduction in respect of income tax which would be payable on his future earnings (*Gillbanks v. Sigournay*, 1959 (2) S.A. 11 (N), i.e. 4 per cent, and 4½ per cent in *Roberts N.O. v. Northern Assurance Co., Ltd.*, 1964 (4) S.A. 531 (D) at 536).

- (c) Compensation for loss of **amenities**, for example the impairment of one's ability to engage in recreation, amusement, etc. (*Eggeling v. Law Union & Rock Ins. Co.*, 1958 (3) S.A. 592 (D) at 597; *Capital Assurance Co., Ltd. v. Richter*, 1963 (4) S.A. 961 (A.D.) at 905; *Pauw v. African Guarantee and Indemnity Co., Ltd.*, 1950 (2) S.A. 132 (S.W.A.)). Such loss depends on one's social position in life (*Tojo v. William Blain & Co.*, 1941 S.R. 72). But much depends upon the age of the plaintiff, i.e. whether he has reached an age when he could not be expected to participate for long in such active sports as tennis, hockey and cricket (*Sigournay v. Gillbanks*, 1960 (2) S.A. 552 (A.D.) at 571).

Loss of sexual and procreative functions which may render the victim unlikely to be able to marry and have children is also an ascertainable loss under this heading giving rise to damages (*Reid v. S.A.R. & H.*, 1965 (2) S.A. 181 (N)). (The decision in this case was reversed on appeal (see 1965 (3) S.A. 439 (A.D.)), but only on the ground that the plaintiff had failed to establish the negligence of the defendant.)

Estrangement from one's husband as a result of disfigurement incurred in an accident would also be a ground for damages, provided that such disfigurement was the actual cause of the disharmony between her and her husband (*Lampert v. Eastern National Omnibus Co., Ltd.* [1954] 2 All E.R. 719 (Q.B.) at 720).

- (d) Compensation for the **shortening** of one's **expectation of life**. This heading is closely associated with that of 'Loss of amenities of life, damages being awarded as a *solatium* for the mental suffering from the contemplation of an early death'. See *Benham v. Gambling* [1941] All E.R. 7 (C.A.); *Gillbanks v. Sigournay*, 1959 (2) S.A. 11 (N), and *sub nomine*, 1960 (2) S.A. 552 (A.D.) at 555; *Dickinson v. Galante*, 1949 (3) S.A. 1034 (S.R.) at 1045) and the two are frequently treated under the one heading (*ibid.*). See also *Flint v. Lovell* [1935] 1 K.B. 345 at 346; *Goldie v. Johannesburg C.C.*, 1948 (2) S.A. 913 at 921. This should be moderate and reasonable (*Bailey v. Howard* [1938] 4 All E.R. 828; *Ross v. Ford* [1937] 3 All E.R. 359; *Roach v. Yates* [1937] 3 All E.R. 442); (1960) 77 S.A.L.J. 438; (1962) 79 S.A.L.J. 43.
- (e) Compensation in respect of **pain, suffering** or **deformity** sustained. Damages under this head are independent of the social position of the plaintiff (*Radebe v. Hough*, 1949 (1) S.A. 380 (A.D.)). Where damages are claimed for bodily injury, the plaintiff is not required to put a separate money value on each different element of the general damages he has suffered (*Reid N.O. v. Royal Insurance Co.*, 1951 (1) S.A. 713 (T)). In regard to pain and suffering, there are really no scales by which pain and suffering can be measured, and there is no relationship between pain and money (*Wholesale Coal Suppliers*, 1941 A.D. at 199; *New India Assn. Co. v. Naidoo*, 1950 P.H., J. 4 (A.D.)). See also (1959) 76 S.A.L.J. 457.

In regard to **brain injury** and **unconsciousness** reducing the victim to a vegetable state, the fact of a lack of his awareness of his injuries does not prevent compensation being awarded for these injuries to the plaintiff (*Gerke N.O. v. Parity Insurance Co., Ltd.*, 1966 (3) S.A. 484 (W), following *Wise v. Kaye and another* [1962] 1 All E.R. 257 (C.A.), which is to the effect that the fact that the injured person is unlikely to live to enjoy personally the damages awarded is no ground for reducing the general damages). See also *West & Sons, Ltd. v. Shepherd* [1963] 2 All E.R. 625 (H.L.) and *Roberts N.O. v. Northern Assurance Co., Ltd.*, 1964 (4) S.A. 531 (D) at 542, for a party may claim for pain and suffering even during periods when he is unconscious (*Sigournay v. Gillbanks*, 1960 (2) S.A. 552 (A.D.) at 570, following *Botha v. Minister for Transport*, 1956 (4) S.A. 375 (W)). See also *Annual Survey*, 1966, pp. 173-6. Per Lord Reid in *West & Son v. Sheppard (supra)*:

'It would be monstrous if the defendant had to pay less because, in addition to inflicting physical injuries, he had made the plaintiff unconscious.'

In this regard it is well to observe that the injuries caused to a child prenatally and while he is still a foetus, gives him a right of action after his birth (*Pinchin N.O. v. Santam Insurance Co.*, 1963 (2) S.A. 254 (N)).

- (f) **Loss of wages.** This subject has been dealt with (*ante*, p. 252). As regards *loss of future earnings* the victim is entitled to claim damages on an actuarial basis (see Corbett and Buchanan, *Quantum of Damages*, p. 47) by a comparison of his earnings, whether professional or occupational, prior to the injury and what his future earning capacity is likely to be during the rest of his estimated lifetime (estimated, usually, at two-thirds of the difference of his present age and eighty years plus three years if the victim is a woman) less the usual deductions of accelerated capitalized payments (cf. *Pittman v. Scrimgeour*, 1947 (2) S.A. 22 (W) at 29–30; *Galante v. Dickinson*, 1950 (2) S.A. 460 (A.D.) at 469; *Sigournay v. Gillbanks* (*supra*) at 557–8 and 566–8).

Death: Where, however, the victim has *died*, different considerations apply, for his estate may not claim for loss of earnings or savings he might have made (*Lockhat's Estate v. North British & Mercantile Insurance Co., Ltd.*, 1959 (3) S.A. 295 (A.D.) at 306–7, overruling *Goldie v. City Council of Johannesburg*, 1948 (2) S.A. 913 (W), and following the English cases cited therein). See also (1960) 77 *S.A.L.J.* 438–46 and (1962) 79 *S.A.L.J.* at 50–4.

Furthermore, such claims for loss of amenities, pain and suffering or deformity or change of personality would fall away upon the death of the victim. The only claim which the estate would have would be the amount of its actual patrimonial loss (*Jankowiak v. Parity Insurance Co., Ltd.*, 1963 (2) S.A. 286 (W)), such as funeral, medical and hospital expenses (*Lockhat's case* (*supra*) and *Hoffa v. S.A. Mutual Fire & Ins. Co.*, 1965 (2) S.A. 944 (C.) at 955). (See *ante*, p. 67.)

- (g) Compensation for **change in personality**, mental capacity and emotional balance flowing from the injury sustained from the accident (*Botha v. Minister of Transport*, 1956 (4) S.A. 375 (T)). **Shock** due to apprehension of injury to oneself (as well as shock from actual injury) may be claimed (*Mulder v. South British Ins. Co.*, 1957 (2) S.A. 444 (W)) (see *ante*, pp. 91–2). But not for subsequent mental shock upon hearing of the death of one's husband (*Schneider v. Eisovitch* [1960] 1 All E.R. 169 (Q.B.)).

Items (a) and (b) are capable of reasonably precise estimation, and the necessary evidence should be placed before the court. Items (c) and, particularly, (e), however, are not capable of any precise estimate; the court can only give a general equitable assessment, and amounts of up to R2,000 have been awarded in cases of severe injury.

In *Sandler v. Wholesale Coal Suppliers, Ltd.*, 1941 A.D. 194, Watermeyer J.A. at 199, in relation to item (e), said:

‘... it must be recognized that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident, by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount awarded as compensation can only be determined by the broadest general considerations . . .’

Compensation complex

It is a well-known fact that many plaintiffs, either consciously or unconsciously, keep alive the disabilities sustained in order to preserve

physical evidence thereof at the time of the trial. In so doing they are definitely not mitigating the quantum of defendant's damages and the logical conclusion is that, where such is the case, damages should be reduced proportionately, that is in cases where the patient proves unco-operative to medical, surgical or orthopaedic treatment. In *Marshall v. Southern Insurance Co.*, 1950 (2) P.H., J. 6 (N), however, Broome J.P. ruled that where the plaintiff surrenders to her trouble, she should not have her compensation reduced merely because she would have undergone diminished suffering had she borne her troubles with reasonable fortitude. In other words, if the physical injury has disturbed the nervous system, damages should not be reduced merely because some other person in the same position would have been able to control his nerves more easily and would have recovered more quickly. The court should, however, have regard to the fact that, with proper psychiatric treatment, there may be a substantial improvement in the victim's health (*Capital Insurance Co., Ltd. v. Richter*, 1963 (4) S.A. 901 (A.D. at 905). In *Moehlen v. National Employers Mutual Gen. Insurance Co.*, 1959 (2) S.A. 317 (S.R.), where it was found that the plaintiff's attacks were due to anxiety or compensation neurosis induced by the accident, such damage was not too remote to be adjusted by compensation.

Proof—medical evidence

In terms of Rule of Court 36 a defendant is entitled to have the plaintiff examined by his own medical practitioner. This rule should be applied fairly, since the party requiring examination should not be hampered in preparing for trial, or in estimating the amount of money which he may wish to offer by way of a settlement of plaintiff's claim. On the other hand, the person to be examined should be subjected to the least possible degree of inconvenience and should not be required to travel a long way in order to be examined on behalf of defendant if this can reasonably be obviated, i.e. if he can be examined by a competent medical practitioner where he resides (*Mgudlwa v. A.A. Mutual Insurance Assn., Ltd.*, 1967 (4) S.A. 721 (E)).

Pleadings and Particulars

Where damages for personal injuries are claimed the plaintiff must set out his damages in such a way that the defendant is reasonably in a position to assess the quantum thereof and not that the defendant is reasonably in a position to be able to ascertain whether the plaintiff's assessment of the quantum is correct. The directions in rule 18(10) merely set out what the plaintiff must aver in regard to personal injuries, i.e. firstly the consequence of the disability and secondly how much is claimed under certain heads (*Rondalia Versekeringskorporasie van S.A. v. Mavundhla*, 1969 (2) S.A. 23 (N), following *Van Tonder v. Western Credit, Ltd.*, 1966 (1) S.A. 189 (C), where Van Winsen J. said that rule 21(1) crystallizes the position which curtails, rather than enlarges the right of the defendant to apply for further particulars to such particulars 'as may be strictly necessary'). See also *Rondalia Versekeringskorporasie van S.A. v. Die Ongevallekom-misaris*, 1968 (4) S.A. 755 (N).

Quantum of Damages for Injuries

Generally speaking, considerations of awards in previous cases of a vaguely comparable nature are not of much value unless they are shown to be broadly similar in all material respects (*Capital Insurance Co. v. Richter*, 1963 (4) S.A. 901 (A.D. at 905-7), for in awarding damages for any physical injury the court is attempting to equate incomprehensibles (*Bastow v. Bagley & Co., Ltd.* [1961] 3 All E.R. 1101 (C.A.)). Per Diplock L.J. at 1103-4:

'What can be said, however, if justice is to be done as between one victim and another and one tortfeasor and another, is that when all proper allowance has been made for what may be widely differing circumstances of individual victims, the sum awarded to one should not be out of all proportion to the sum awarded to another in respect of similar injuries.'

See also *Sims v. William Howard & Son, Ltd.* [1964] 2 Q.B. 409 (C.A.) at 415, where Lord Denning said that the judges have, over the years, evolved a scale which is known and applied daily throughout the country. Care must, however be taken lest essential differences between individual cases are overlooked or the desirable tendency towards uniformity result in stagnation or harden into rigid rules of law (per Schreiner J.A. in *Sigournay v. Gillbanks*, 1960 (2) S.A. 552 (A.D.) at 555-6, and see also *Singh v. Toong Fong Omnibus Co., Ltd.* [1964] 3 All E.R. 925 (P.C.) at 927). Accordingly, however desirable it may be theoretically that there should be some measure of uniformity of awards in respect of general damages for personal injuries in similar cases, unless caution is exercised in comparing awards, it is doubtful whether this desirability would outweigh the risk of fettering the trial court's discretion (*Marine & Trade Insurance Co., Ltd. v. Goliath*, 1968 (4) S.A. 329 (A.D.)).

In assessing damage on a comparative basis, therefore, regard must also be had to the change in the value of money since the previous decision was arrived at (*Sigournay's* case (*supra*); *Norton v. Ginsberg*, 1953 (4) S.A. 537 (A.D.) at 541 and 551). In this regard it should be noted that the Appeal Court is at large to amend the damages awarded where the damages estimated 'differs substantially' from the figure awarded by the lower court (*ibid.*) (*Sandler v. Wholesale Coal Suppliers*, 1941 A.D. 194 at 200; *Neuhaus N.O. v. Bastion Ins. Co., Ltd.*, 1968 (1) S.A. 398 (A.D.) at 409-10), and where the actuarial calculation is based on facts not found in the evidence the Appeal Court will come to its own findings on the evidence given and the probabilities of the case (*Sigournay v. Gillbanks* (*supra*) at 565-6).

It is, not proposed to deal with the numerous decided cases indicating the measure of damages to be awarded in particular instances, since the whole topic is now amply dealt with by Corbett and Buchanan in their second edition of *Quantum of Damages in Bodily and Fatal Injury Cases*, as qualified by Boberg in (1965) 82 S.A.L.J. at 555-7.

(b) INJURY TO WIFE

A husband is entitled to damages in his own right in respect of injury to his wife, but **only to patrimonial loss**, i.e. to the actual pecuniary loss which he has sustained (*Abbott v. Bergman*, 1922 A.D. 53; *De Vaal v. Messing*, 1938 T.P.D. at 40; *Behrens v. Bertram Mills Circus* [1957] 1

All E.R. 583 (Q.B.) (where compensation was awarded for cost of necessary domestic help and loss of wife's society)). This will include medical and other expenses, and compensation in respect of the increased expenditure which will be required for the bringing up of young children; but **no award** can be made in respect of **mental distress** (*ibid.*), unless it has been caused by physical injury. This is the ordinary action under the *lex Aquilia* in its extended form, and not the anomalous action allowed to dependants. In other words, if it is necessary for the wife to work to assist the husband in **maintaining the joint household** he has a good cause of action in being deprived of such assistance whether married in or out of community of property (*Plotkin v. Western Assurance Co.*, 1955 (2) S.A. 385 (W) at 393. But see *Burgess's case* [1955] 1 All E.R. 511 (Q.B.)).

In a declaration it is sufficient to allege the relationship only, there being no necessity to allege the respective means of the parties (*Gildenhuys v. Transvaal Hindu Educational Council*, 1938 W.L.D. 260).

Where a husband sues for damage caused to his wife partly through her own negligence and partly through defendant's negligence, since he was not at fault in his own cause of action, which is personal to him, he is entitled to full damages for what he has suffered (*Mallett and Arthur v. Dunn* [1949] 1 All E.R. 973 (K.B.)), and, vice versa, a wife who is injured partly by her husband's negligence and partly by the defendant's negligence, may claim the full damages which she has suffered. (See *Hahlo on Husband and Wife*, pp. 109–10.) If, however, she is married in community of property she is not entitled to sue in her own name for hospital and medical expenses for which her husband is liable (*Schnellen v. Rondalia Assurance Corporation of S.A., Ltd.*, 1969 (1) S.A. 31 (W)).

(c) INJURY TO HUSBAND

The anomalous action allowed to the wife, and other dependants, for the **death** of the paterfamilias will not be extended to allow them to sue for **injuries** caused to the father which did not result in his death (*De Vaal v. Messing*, 1938 T.P.D. 35), the reason, no doubt, being that he has his own action for damages. It follows that neither wife nor children have an action based merely upon the impairment of the earning capacity of the husband. It is submitted, however, that in principle the wife should have an action if she can prove that in consequence of the injury to the husband she has been compelled to incur increased expenditure in respect of her legal duty to maintain the children; or has incurred actual medical or other expenses.

This submission has implicit support in the decision in *Ex parte Oliphant*, 1940 C.P.D. 527, where Davis J. (as he then was) said at 542:

'It would appear that the right given to the wife and children, though it also no doubt arises from the wrongful act of the defendant, is one wholly distinct and separate from the right of the deceased and his estate',

and he pointed out (at 544) that Greenberg J. said (*obiter*) in *De Vaal v. Messing* (*supra*) that although there can be only one cause of action arising from an *injuria*,

'This does not mean that different persons may not have different interests in such right or assets for which they are entitled to be compensated, e.g. a lessor and lessee or the master and servant. . . . But these latter considerations do not apply to the

present case, as the injured person's interest is comprehensive and includes the interests of his dependants.'

It is submitted, therefore, that where the husband's claim does not comprehend or include the patrimonial loss to his wife, she would have a ground of action for her own loss. (See Howrood in (1960) 77 *S.A.L.J.* at 451 and the American decisions cited by Hahlo (*supra*) at p. 110.) In *Lambert v. Eastern National Omnibus Co.* [1954] 2 All E.R. 719 (Q.B.) the wife recovered damages in consequences of a facial disfigurement as a direct consequence of which her husband left her. Here the wife did not sue for loss of consortium but for the loss of her husband as a direct result of her injury. In this regard it has been held that the wife has no action for damages sustained for loss of **consortium** inasmuch as her husband had been rendered physically incapable of sexual intercourse owing to injuries sustained by him by the negligence of the defendant (*Best v. Samuel Fox & Co.* [1952] 2 All E.R. 394 (H.L.)). But surely, unless such claim has been included in the husband's claim, she ought to have a cause of action?

Since section 31 of Act No. 76 of 1963 deals only with the *death* of a husband, married by way of a customary union, it would seem that the decisions in *Zulu v. Minister of Justice*, 1956 (2) S.A. 128 (N), and *S.A. National Trust en Assuransie Maatskappy, Bpk. v. Fondo*, 1960 (2) S.A. 476 (A.D.), declining *locus standi* to the Bantu wife to sue, would still apply in respect of *injuries* sustained by the male spouse. But the customary wife is still entitled to claim for damages, as guardian of the children of that union, for such loss as have been suffered by them (*Zondi's case (supra)*).

(d) INJURY TO CHILD

In the case of a minor child, the father has an action in his own right in respect of **medical and other expenses incurred** which he is under a legal obligation to pay, and he would also have an action in respect of loss of services (*Bellstedt v. S.A.R.*, 1936 C.P.D. at 410, citing *Abbott v. Bergman, supra*). It must be shown, however, that the services had a monetary value. In *Bertram v. C.S.A.R.*, 1905 T.H. 234, it was held that the value of the services of a boy of 9 years were more than offset by the expense of maintaining him. In this regard it must be proved that not only did the child contribute to the support of the father claiming damages, but also that there was a **legal duty** to contribute because the circumstances of the claimant were such that he needed the contribution (*Oosthuizen v. Stanley*, 1938 A.D. 322), and also that the child had sufficient means to contribute towards the parent's support (*Petersen v. South British Insurance Co., Ltd.*, 1964 (2) S.A. 236 (C) at 238). The parent must allege and prove that the maintenance was necessary (*Waterson v. Maybery*, 1934 T.P.D. 210; *Stander v. Royal Exchange Assurance Co.*, 1962 (1) S.A. 454 (S.W.)). The question whether a father is in need of support is not, on the other hand, to be decided on the footing that he is entitled to provide for himself in priority to his wife and children (*ibid.*). There is no necessity, moreover, for him to establish that he was actually in receipt of maintenance at the time of the death of his son, for his claim may include loss of **prospective gains** (*Jacobs v. Cape Town Municipality*, 1935 C.P.D. 474; *Prior v. S.A.R.*, 1935 O.P.D. 123). In *Bertram's* case, however, it was held that the prospect of the son being called upon in the future to maintain his

father was too conjectural to be made a ground of damages, the father being still a young man; but no doubt damages would be awarded on this head on suitable facts, as in an action for the death of the child (*Jacobs v. Cape Town Municipality*, *supra*). It would appear that a mother should have a similar action in respect of her child, if the father is dead or if for some other reason the services are rendered to her. In order to succeed the parent is not required to show that she would be reduced to abject poverty or starvation before relief may be granted, for the court will have regard to her status in life, what she has been used to in the past and the comforts and conveniences and advantages to which she has been accustomed (*Wigham v. British Traders Ins. Co., Ltd.*, 1963 (3) S.A. 151 (W) at 153-4).

There would seem to be no action in respect of injury to a major child (*arguendo* from *De Vaal v. Messing*, *supra*). (See also *post*, p. 271.)

Custody of moneys awarded: Where damages have been awarded to a minor child for injuries sustained there are several methods which the court may adopt for the custody and disposal thereof. It may order:

- (a) the amount be paid into the Guardian's Fund with a direction to the Master to pay out, from time to time, in his discretion, such sums as he considers necessary for the maintenance of the minor (*Paterson v. S.A.R. & H.*, 1931 C.P.D. 289); or
- (b) the insurance company be directed to pay out a monthly amount to the child until the child's death and to give security for due payment to the Registrar of the Court (*Kleinhans v. African Guarantee and Indemnity Co.*, 1959 (2) S.A. 619 (E)); or
- (c) the amount be paid to a trustee, appointed by it, to invest the moneys and to apply the income from the trust fund to the payment of the child's medical expenses, transport, maintenance and education (*Ehlers v. S.A.R. & H.*, 16/11/59 E.D.L.); or
- (d) that the amount be paid to a trust company to administer the award until the minor reached majority (*Van Rij N.O. v. Employers' Liability & Assurance, Ltd.*, 1964 (4) S.A. 737 (W)).

(e) INJURY TO SERVANT

The Roman-Dutch authorities allow the master an action for loss of services consequent on injury to a servant (Grot. 3.34.3). A similar action still exists in English law; it is the basis for the award of damages for seduction, but is not confined to such cases, and was recently applied to injury to members of the Air Force (*Attorney-General v. Valle-Jones* [1935] 2 K.B. 209). Thus, where an employee, a music-hall artiste, was injured owing to the negligence of the defendant company in allowing a loose floorboard to exist on the stage where he was performing, it was ruled that the master was entitled to consequential damages (*Mankin and another v. Scala Theadrome Co.* [1946] 2 All E.R. 614). This right of action is, in South Africa, applicable solely to **domestic** servants and does not apply in regard to Government servants unless plaintiff can establish that the defendant knew of the relationship existing between the servant and the master and must, therefore, have contemplated the results of his negligence (*Union Govt. v. Ocean Accident & Guarantee Corporation*, 1956 (1) S.A. 577 (A.D.)).

In *Valle-Jones's* case (*supra*) wage paid and disbursements made were held to be damage recoverable. It may be questioned whether this standard would be accepted in our courts in a case where there is **no legal obligation to pay** wages and disbursements to the servant after his injury. On the other hand it seems that, upon proof of damages for loss of services, a competent action will lie. Apparently this action is not recognized by the Scots law (*Reaves v. Clan Line*, 1925 S.C. 725). See also Norman-Scoble, *Master and Servant*, p. 298.

DAMAGES FOR DEATH

(a) DEATH OF PATERFAMILIAS

By an anomalous extension of the principle of the *lex Aquilia* (derived no doubt from Germanic sources), an action for damages consequent on the unlawful killing of a pater is allowed to those who were legally entitled to support from him. The basis of the action is the legal right to support from the deceased and a legal duty on the part of the deceased to support the claimant (*Union Govt. v. Lee*, 1927 A.D. 202; *Union Govt. v. Warneke*, 1911 A.D. 657; *Jameson's Minors v. C.S.A.R.*, 1908 T.S. 575; *Martindale v. Wolfaardt*, 1940 A.D. 235; *Vaughan N.O. v. S.A. National Trust & Ass. Co.*, 1954 (3) S.A. 667 (C), and *Oosthuizen v. Stanley*, 1938 A.D. 322). The *utilis actio* by dependants against a person who has unlawfully killed the bread-winner, who was *legally liable* to support them, is a remedy which relates to *material loss* caused to them by his death (*Legal Insurance Co. v. Botes*, 1963 (1) S.A. 608 (A.D.)), i.e. by putting them in as good position, as regards maintenance, as they would have been had he not been killed (*Groenewald v. Snyders*, 1966 (3) S.A. 237 (A.D.) at 246). Those falling within the ambit of 'dependants' are therefore primarily the widow and children; grandchildren whose parents are dead would probably be included. It seems very doubtful whether collaterals would be included at all, though a duty of support may extend to them in certain circumstances (*Ford v. Allen*, 1925 T.P.D. 5; *United Building Society v. Matiwane*, 1933 E.D.L. at 284), since the authorities dealing with the action make no mention of them; in any event they could not claim to share with a widow or children. Connections by marriage are not included (*ibid.*, and *Jacobs v. Cape Town Municipality*, 1935 C.P.D. 474, where a stepmother claimed unsuccessfully).

Dependants also includes the natural children of the deceased born of a union not legally recognized (*Sursathi v. Elliott*, 1963 (3) S.A. 232 (D) at 235). But it is the dependants who must sue for their own patrimonial loss and not the deceased's estate (*Lockhat's Est. v. North British Mercantile Ins. Co.*, 1959 (1) S.A. 24 (N) at 28, and 1959 (3) S.A. 295 (A.D.)). This anomalous action is available only to relatives who are near dependants (*Union Govt. v. Warneke* (*supra*) at 664 and *S.A. Nasionale Trust en Assuransiematskappy, Bpk. v. Fondo*, 1960 (2) S.A. 467 (A.D.)). Here it was said by Botha J.A. (*obiter* at 474) that a divorced wife of a deceased man who has a court order against him to pay her maintenance, could not be regarded as a dependent under the *utilis actio*. (This dictum has been criticized in (1961) 79 *S.A.L.J.* 103 but, it is submitted the dictum of Innes C.J. in *Warneke's* case (*supra*) appears to justify the judge's comment.)

It follows that, if there are no dependants of the deceased, no consequent liability is owed to them; consequently to kill a bachelor with no dependants costs the wrongdoer nothing since axiomatically it is cheaper to kill than to maim a man. (See (1964) 81 *S.A.L.J.* 290.)

The fact that the deceased was guilty of contributory negligence is no defence to an action in this regard (*McRitchie v. S.A.R.*, 1918 N.P.D. 311; *Union Govt. v. Lee*, 1927 A.D. 202; *Bester v. Silva Fishing Corp'n. (Pty.) Ltd.*, 1952 (1) S.A. 589 (C)); but if the effective cause of the deceased's death was due to his own negligence only, then no damages will be recoverable by his dependants (*Wilson v. S.A.R. & H.*, 1940 N.P.D. 509).

Necessary allegations

In respect of the action by parents for the death of a child, a question arises as to whether it is essential for the plaintiff to allege and prove that he was dependent on the support of the child, that is to say, that he was unable to support himself (*Oosthuizen v. Stanley*, 1938 A.D. 322). In the case of widow and minor children suing for the death of the pater it will very seldom arise, since they are entitled to support whenever the pater is able to render it, and if he was able to render it he will have been doing so. But in the case of a **major child**, it will no doubt be essential for him to aver either that he was dependent on the deceased and was unable without his assistance to support himself (see *Young v. Hutton*, 1918 WL.D. 90; and *Wigham v. British Traders Insurance Co.*, 1963 (3) S.A. 151 (W), *post*, p. 279), or *semble*, that there was a fair probability that he would soon have become so dependent. The necessary allegations would appear therefore to be (a) the relationship from which the duty of support arose, (b) that support was actually rendered during life, or would as a reasonable probability have been rendered in the future, and (c) dependency on such support either actually at the death or as a strong probability in the near future (*Oosthuizen v. Stanley*, *supra*). (Compare the discussion in the section below on Death of Child and the authorities there cited.)

An anomalous action

The action is anomalous not merely because it gives a right of action for the death of a human being but also because although the duty breach of which gives rise to it is a duty owed to the deceased the right of action comes to the dependants quite independently and is not derived from the deceased or his estate (see per Innes C.J. in *Jameson's Minors v. C.S.A.R.* at 584; *Bantjes v. Rosenberg*, 1957 (2) S.A. 118 (T) at 119, and *S.A.R. & H. v. Marais*, 1950 (4) S.A. 610 (A.D.) at 618). It follows that the plaintiffs are not 'identified' with the contributory negligence of the deceased (see *ante*, p. 26; *Plotkin v. Western Assurance Co., Ltd.*, 1955 (2) S.A. 385 (W) at 390) and that a contract by which the deceased gave up his right to damages for personal injury will not bar them (*Jameson's Minors* case); and that it is doubtful whether the defence of *volenti non fit injuria* will affect them (see *ante*, p. 57). As was indicated above, unless the dependants can show that the injured party has been killed they will have no right of action for damages caused by the joint negligence of the paterfamilias and the defendant (*De Vaal N.O. v. Messing*, 1938 T.P.D. at 35). The defendant's action is **not barred** by the fact that the deceased, in his life-

time, effected a **compromise in full settlement** with the wrongdoer (*Ex parte Oliphant*, 1940 C.P.D. 537).

In *Zulu v. Minister of Justice*, 1956 (2) S.A. 128 (N), it was held that, although a **Native**, married under Native law and custom, is legally obliged to support his wife, yet she is not entitled under the common law to sue a European for damages sustained by her on account of his negligence in killing her husband and thereby depriving her of the financial support she hitherto enjoyed from him. The same conclusion was reached in *S.A. National Trust & Ass. Co. v. Fondo*, 1960 (2) S.A. 267 (A.D.), and *Zondi v. Southern Insurance Association*, 1964 (3) S.A. 446 (N). These decisions have now been rendered inapplicable by section 31 of Act No. 76 of 1963, which provides that a partner to a customary union is entitled to sue for damages for her pecuniary loss of support (*Pasela v. Versekeringskorporasie van S.A., Bpk.*, 1967 (1) S.A. 339 (W)).

Pecuniary loss only

The golden rule is that the dependant should be put in the same pecuniary position in which he or she would have been had the bread-winner not been unlawfully killed by the defendant. Financial loss only is recoverable for, in general, there can be no monetary compensation for mental suffering or bereavement (*Union Government v. Warneke*, 1911 A.D. 657 at 667; *Schneider v. Eisovitch* [1960] 1 All E.R. 169 (Q.B.)). This is so since the *utilis actio* of the *lex Aquilia* provides only for pecuniary loss (*Millward v. Glazer*, 1949 (4) S.A. 931 (A.D.) at 941). The position is the same in England (*Taff Vale Railway Co. v. Jenkins* [1913] A.C. 1 (H.L.); *Davies v. Powell Duffryn Associated Collieries, Ltd.* [1942] A.C. 601 (H.L.) at 657).

ASSESSMENT OF DAMAGES

(1) *Gross income*

Some courts assess the total loss of all the dependants as a whole and then apportion it amongst the dependants, while others assess the loss of each dependant separately, but in each case the general rule is to assess as nearly as possible, firstly the gross amount per annum which the deceased would, in all probability, have contributed towards the support of his dependants, i.e. his whole income less his expenses in earning that income and less the amount of his own support and then to multiply this amount by the number of years, during which such support would have accrued to the said dependants, less a certain percentage to make provision for the fact that the whole amount is payable in one capital sum (i.e. the 'accelerated value' thereof) instead of accruing to them over the course of future years.

In regard to such gross income there are certain contingencies to be considered in each case, for instance, if the deceased was a young man, the probability of his present income improving by reason of regrading or of increments in his salary (*Snyders v. Groenewald*, 1966 (3) S.A. 785 (C); *Chapman v. London Ass. Co.*, 1951 (2) P.H., J. 8 (W)). On the other hand, if he were an elderly man due shortly for retirement, then his future income would have to be diminished from the time he went on pension (if such pension were claimable as of right), or diminished by loss of

mental vigour (*Halley v. Cox*, 1923 A.D. 243 at 245) and see *Jameson's Minors v. C.S.A.R.*, 1908 T.S. at 604.

Such mathematical calculations do not, however, provide a substitute for common sense for, as was said in *Daniels v. Jones* [1961] 3 All E.R. 24 (C.A.) at 28, 'Arithmetic is a good servant but a bad master'. The statistics, relevant to the calculation, are, therefore, only a starting point and are not one of the facts, since the court will not be shackled thereby (*Legal Insurance Co. v. Botes*, 1963 (1) S.A. 608 (A.D.) at 614, 617-18, and see *Trimmel v. Williams*, 1952 (3) S.A. 786 (C) at 792 (actuarial estimate excessive)).

Our courts have, in a large number of instances, accepted and relied upon the **actuarial evidence** where such appears reasonable (*Laney v. Wallem*, 1931 C.P.D. 361; *De Wet v. Odendaal*, 1936 C.P.D. 103 at 106-7; *Chisholm v. East Rand Proprietary Mines*, 1909 T.H. 297 at 302, and *Roberts v. London Assurance Co., Ltd.*, 1948 (2) S.A. 841 (W) at 849). There are, however, 'no hard and fast rules' for the assessment of damages (per Dove-Wilson J.P. in *Smart v. S.A.R. & H.*, 1928 N.P.D. 361 at 362, and *Graaf v. Speedy Transport*, 1944 T.P.D. 236 at 239). In *Sursathi v. Elliott*, 1963 (3) S.A. 233 (N) at 235, the Court followed the 'discount tables' set out in Corbett and Buchanan at pp. 73 to 76. In *Bester v. Silva Fishing Corpn. (Pty.) Ltd.*, 1952 (1) S.A. 589 (C) at 600, however, Herbstein J. took a different line to that of the actuary.

The future **devaluation of money** should also be considered in making an estimate of the gross income of the deceased (*Snyders's case (supra)*). Here it was held that the 'joint expectation of life of the deceased and the plaintiff should be calculated in accordance with the S.A. Population Mortality Tables for whites No. E 5 and that the discount rate of interest, to determine the present value of the loss of support, should be taken as 4½ per cent.

Income Tax: In *Schneider's* case it was decided that the amounts which the deceased would have had to pay in income tax, at the prevailing rates, should also form a deduction from the deceased's gross prospective earnings and this is in accord with the decision of *British Transport Commission v. Gourley* [1955] 3 All E.R. 796 (H.L.) and *Pitt v. Economic Insurance Co., Ltd.*, 1957 (3) S.A. 284 (D) at 287. In *Whitfield v. Phillips*, 1957 (3) S.A. 318 (A.D.) at 345, however, Steyn C.J. expressed doubts as to the validity of this ruling in our law, and in *Sigournay v. Gillbanks*, 1960 (2) S.A. 552 (A.D.) at 568, Schreiner A.J. preferred to leave the matter open, since the question had not been fully argued. It is submitted that the logic of the ruling in *Gourley's* and *Pitt's* cases is unanswerable, but that, since, as Holmes J. (as he then was) said, the court is called upon to 'ponder the imponderable' and to arrive at an award which can only be 'an informed guess' on the complexity of the calculations and computations, it may well be that a future appellate decision may rule that public policy is better served by avoiding additional hazards to protracted litigation in ignoring the prospective incidence of income tax payments as a deduction to the deceased's estimated future income. For previous calculations on income tax see *De Wet v. Odendaal*, 1936 C.P.D. 103 at 107.

Contingencies: In assessing the deceased's gross income there are also certain contingencies which may have to be considered and evaluated,

such as his state of health at the time (*Maasberg v. Hunt, Leuchars & Hepburn, Ltd.*, 1944 W.L.D. 2 at 5). It may also be diminished by the possibility of his unemployment or by strikes (*Roberts v. London Assurance Co., Ltd.*, 1948 (2) S.A. 841 (W) at 847).

Social advantages: If there is evidence to show what the social advantages were and that they were sufficiently tangible as to be estimated as a loss in respect of the deceased's high or exalted social position no longer being available to his dependants, the court may make an award accordingly (*Roberts v. London Assurance Co., Ltd.* (*supra*) at 851).

(2) DEDUCTIONS

Having assessed the gross income, during the normal life expectancy of the deceased had he lived, the court could then direct its mind to the various legitimate deductions which can be made in assessing the actual loss suffered by each dependant, resultant, inheritances, charitable donations, the prospect of the widow's remarriage, her earnings, the dependant's income or private means. In this regard the court has to take into consideration the estimated life of the dependants, as well as that of the deceased (*Bester v. Silva Fishing Corporation (Pty.) Ltd.*, 1952 (1) S.A. 589 (C) at 600). This is sometimes estimated as two-thirds of the difference between the present age and 80 years—apart from other contingencies depending on longevity (*Maasberg v. Hunt, Leuchars & Hepburn, Ltd.* (*supra*) at 5). Usually, the average woman lives three years longer than the average man.

(a) **Remarriage Prospects**: The possibility of the remarriage of the deceased's widow may be considered in assessing her loss (*Legal and General Insurance Co. v. Botes*, 1963 (1) S.A. 608 (A.D.) at 617–18; *Paterson v. S.A.R. & H.*, 1931 C.P.D. 289 at 300; *Hulley v. Cox*, 1923 A.D. 234 at 246). In this regard much would depend upon her comeliness, age, the number of her dependants whether she presently has remarriage in view or whether she would be deterred from marrying by the loss of an inheritance by remarriage (*Paterson v. S.A.R. & H.*, 1931 C.P.D. 289 at 300; *De Wet v. Odendaal*, 1936 C.P.D. 103 at 107; *Bester v. Silva Fishing Corporation (Pty.) Ltd.*, 1952 (1) S.A. 589 (C) at 600; *Trimmel v. Williams*, 1952 (3) S.A. 786 (C) at 793 (where deductions were made from her estimated loss on a percentage basis)). On the other hand her second husband may be older than the deceased, worse off financially, or of indifferent health (cf. *De Wet's* case (*supra*) at 107; *Roberts v. London Assurance Co., Ltd.*, 1948 (2) S.A. 841 (W) at 850, and *Botes's* case (*supra*) at 618. However, the Court ruled that an assessment could not be arrived at mathematically). (See also *Chisholm v. East Rand Proprietary Mines*, 1909 T.H. at 302.)

Such prospect of remarriage cannot affect the children's awards, since a stepfather is under no legal obligation to support them unless the marriage is in community of property (*Hahlo on Husband and Wife*, pp. 215–16, 227–8).

Similarly a husband's claim for pecuniary loss on account of his wife's death may be abated by the possibility of his remarriage (*Cooke & Cooke v. Maxwell*, 1942 S.R. 133). Such possibility would be nearer a probability than in the case of a widow.

(b) **Widow's earnings or private means:** The fact that the widow is possessed of private means may, in some cases, be relevant in ascertaining the amount of actual support given to her by her husband prior to his death and likely to be provided for by him in his will. In some cases her private means may be such that she would probably gain by not having to maintain an impecunious husband (*Gildenhuys v. Transvaal Hindu Educational Council*, 1938 W.L.D. 260 at 262). The test is, has she suffered a loss? For she cannot have lost support which she never received (*Groenewald v. Snyder*, 1966 (3) S.A. 237 (A.D.)).

In regard to her earnings prior to her husband's death, these are relevant in ascertaining her actual loss of support. In regard to *post-mortem* earnings, however, it has been held that these are not deductible from the support which she was accustomed to receive from her deceased husband prior to his death (*Peri-Urban Areas Health Board v. Munarin*, 1965 (3) S.A. 367 (A.D.) at 375-6, following *Ongevallekommissaris v. Santam Versekeringsmaatskappy, Bpk.*, 1965 (2) S.A. 193 (T) at 200-6). This is so because her ability to work was always present and to suggest that her husband's death has 'freed' her to seek employment or has 'released a flood of earning capacity' assumes that she was not so free to work during the marriage. Such argument confuses choice with lack of freedom. She may not have chosen to work during her marriage but now decides to seek employment after her husband's death, often being prompted by economic necessity and, since her employment results from her own independent volition, and not from the death, her earnings are not deductible as 'a gain consequent upon death' (Boberg in (1964) 81 *S.A.L.J.* at 222-4). In view of the decision in *Munarin's* case (*supra*) it is doubtful whether the decisions in *Chisholm v. East Rand Proprietary Mines, Ltd.*, 1909 T.H. 297; *Arendse v. Maher*, 1936 T.P.D. 162 at 164, and *Smart v. S.A.R. & H.*, 1928 N.P.D. 361 at 365, in so far as it was deemed that the wife might 'mitigate her loss' by going out to work, would now be applicable.

(c) **Insurances:** Moneys falling due to the dependant by reason of accrual consequent upon the death of the deceased previously fell to be deducted from the estimated loss of support claimed. The value of a life or accident policy was calculated on an 'accelerated value' basis, being actuarially estimated by assessing the difference between the value of the money accruing as an immediate possession and its value as a future benefit, having regard to the deceased's expectation of life at the time of his death. If her interest in the policy is contingent upon her surviving the deceased, the value of the policy to her had to be further multiplied by the probability of her survival (*Legal Insurance Co. v. Botes*, 1963 (1) S.A. 608 (A.D.) at 620-1; *Bester v. Silva Fishing Corporation (Pty.) Ltd.*, 1952 (1) S.A. 589 (C) at 600; *Roberts v. London Assurance Co., Ltd.*, 1948 (2) S.A. 841 (W) at 850, and *Maasberg v. Hunt, Leuchars & Hepburn, Ltd.*, 1944 W.L.D. 2 at 13).

The effect of these decisions has now been swept away by Act No. 9 of 1969 which reads as follows:

(1) When in an action, the cause of which arose after the commencement of this Act, damages are assessed for loss of support as a result of a

person's death, no insurance money, pension or benefit which has been or will be paid as a result of death, shall be taken into account.

(2) For the purpose of sub-section (1)

- (i) 'benefit' means any payment by a friendly society or trade union for the relief or maintenance of a member's dependants;
- (ii) 'insurance money' includes a refund of premiums or any payment of interest on such premium;
- (iii) 'pension' includes a refund of contributions and any payment of interest on such contributions, and also any payment of a gratuity or other lump sum by a pension or provident fund or by an employer in respect of a person's employment

Any ruling to the contrary in *Groenewald v. Snyders*, 1966 (3) S.A. 237 (A.D.), would now cease to be operative.

(d) **Insurance Premiums:** Until recently it has been the practice to make a deduction in respect of the estimated premiums which the deceased would have had to pay on his insurance policy had he not been killed (see *Van Heerden v. Bethlehem T.C.*, 1936 O.P.D. 115; *De Wet v. Oendaal*, 1936 C.P.D. 103 at 107-8; *Van den Berg v. Parity Insurance Co., Ltd.*, 1966 (2) S.A. 621 (W)), but in *Groenewald v. Snyders* (*supra*) at 249, Holmes J.A., after referring to *Boberg* (1964) 81 S.A.L.J. 346 and also *Howroyd & Howroyd* in (1958) 75 S.A.L.J. at 77-81, rejected the contention that such premiums, whether in diminution of the deceased's gross income or as a benefit from the cessation of the premiums, should be made. In so ruling the learned Judge had regard to predominant judicial views in this country and also the harsh results to dependants from such decisions. It is clear, therefore, that such possible future premiums, cannot now be taken into account.

(e) **Pensions:** In some spheres of employment contractual arrangements are made with the deceased's employer for the payment of a pension to the deceased's widow during her lifetime, and in such cases the evaluation thereof, during her anticipated period of life, previously properly formed a deduction from the gross income accruing to her in respect of her loss (*Baker v. Dalgleish Shipping Co.* [1922] 1 K.B. 361 (C.A.)). There was apparently no difference, in this respect, whether the pension was on a contributory or non-contributory basis (*Jenner v. Allen West & Co., Ltd.* [1959] 2 All E.R. 115 (C.A.) at 123-4). But where the award of a pension was on a voluntary basis, or prospective only or dependent upon whether the widow obtains a judgment for damages, the amount of the deduction was not so high (*Johnson v. Hill* [1945] 2 All E.R. 272 (C.A.) at 274). See also *Indrani v. African Guarantee & Indemnity Co., Ltd.* (below).

Today, by reason of the provisions of Act No. 9 of 1969, the aforesaid decisions would be applicable only to actions arising from deaths prior to the commencement of the Act.

(f) **Voluntary contributions:** Benefit of a charitable nature accruing to the dependant which is in the nature of a gift does not fall to be considered as a deduction (*Maasberg v. Hunt, Leuchars & Hepburn*, 1944 W.L.D. 2 at 14), since this is not a *causa causans* of the death nor does it arise out of the deceased's own patrimony (but see *Boberg* in (1965) 82

S.A.L.J. at 251-4), and it is really to be regarded as a *res inter alios acta*. Were the rule otherwise, then the probability of her receiving aid, as a destitute woman, from the Department of Social Services, could be taken into account, which would mean that the defendant would be profiting at the expense of the State or general public and this surely cannot be so. (See *Browning v. War Office* [1963] 1 Q.B. 750 (C.A.) at 759.) *Browning's* case was not referred to in the decision in *Indrani and another v. African Guarantee & Indemnity Co., Ltd.*, 1968 (4) S.A. 606 (D), where Fannin J. held that the allowances already made to a widow in terms of section 89 of the Children's Act, No. 33 of 1960, could not be regarded in the same light as an *ex gratia* payment but that, since such allowances are liable to revision and may even be withdrawn by the Department at any future time, such future allowances would not fall to be taken into account in measuring her damages. It is submitted, however, that the basis of the ruling in *Browning's* case is a cogent and logical one and that the decision therein, is preferable to that in *Indrani's* case.

In so far as voluntary contributions made by the deceased to any friendly society or trade union, no such benefit accruing to his dependants can now be taken into account. (See Act 9 of 1969 cited above.)

(g) **Inheritances:** Moneys received by dependants as a consequence of the death of the deceased, have to be deducted from the amount of the estimated support claimed (*Laney v. Wallem*, 1931 C.P.D. 360 at 362), as where the widow was married in community of property and, under a joint will, became the sole heiress, she would inherit one-half of the deceased's patrimony (*Botes's* case, 1963 (1) S.A. 608 (A.D.) at 619-20. See, also, *Roberts's* case, 1948 (2) S.A. 841 (W) at 851). This would also include the value of a usufruct left to the wife (*De Wet v. Odendaal*, 1936 C.P.D. 103 at 107). But if the widow was already at the time of death enjoying the use of a house to live in, with the furniture therein for her comfort, she cannot be said to be pecuniarily better off as a result of the deceased's demise and no deduction should be made therefor (*Maasberg v. Hunt, Leuchars & Hepburn*, 1944 W.L.D. 2 at 13).

In this regard the *ratio decidendi* in *Groenewald v. Snyder*, 1966 (3) S.A. 237 (A.D.), could competently be applied, namely, that the fact that the widow has profited from an inheritance accruing to her upon the death of her husband and that she would be obliged to expend some of it in the support of her children, would be no ground for denying to them the loss of support suffered by reason of the death of their father.

(3) ALLOCATIONS OF AWARDS

The practice is to calculate each dependant's loss separately and to award to each his own particular damages, but sometimes the courts calculate the damages in one lump sum and then proceed to apportion that sum amongst the various dependants. In the latter case the net figure is frequently divided by giving a half share to each parent and if there is a child, to allocate two-fifths to each parent and one-fifth to the child or, if there are two children, each parent is allocated one-third and each child gets one-sixth. (See *Roberts's* case (*supra*) at 849 and *Botes's* case (*supra*) at 616.) In making such awards consideration is given to the age upon which it is estimated the child will become self-supporting and here the

courts have varied between 16 years, 18 years and 20 years. (See *Smart v. S.A.R. & H.*, 1928 N.P.D. 361 at 363; *Roberts's case (supra)* at 850 and *In re Estate Visser*, 1948 (3) S.A. 1129 (C) at 1138.)

For further, and more detailed information on delictual damages for death and bodily injury see the *magnum opus* by Professor Boberg in the following issues of the *S.A.L.J.*: (1964) 81 *S.A.L.J.* at 194–225, 346–70 and (1965) 82 *S.A.L.J.* at 96–107, 247–60 and 324–56, and also Corbett and Buchanan, *The Quantum of Damages in Bodily and Fatal Injury Cases*.

Claim by deceased's estate: When a man is injured and, shortly thereafter, dies as a result of those injuries, his claim to compensation is limited to the period during which he is expected to continue to live, and he has no claim for loss of **savings** beyond that date. He is not, notionally, kept alive until the date when, but for the accident, he would, actuarially, have died. This being so his estate can make no claim for loss of savings after his death. In other words, the deceased is not an asset in his estate and his executor has no claim on behalf of the estate to recover his value as the earner of money (*Lockhat's Estate v. North British and Mercantile Insurance Co.*, 1959 (3) S.A. 295 (A.D.) at 306). In this case the decision in *Goldie v. City Council of Johannesburg*, 1948 (2) S.A. 913 (W), was dissented from. See also *Harris v. Bright's Asphalt Contractors* [1953] 1 Q.B. 617; *Richards v. Highway Ironfounders (West Bromwich) Ltd.* [1955] 3 All E.R. 205 (C.A.), and (1962) 79 *S.A.L.J.* 43).

(b) DEATH OF WIFE

The husband has an action for damages for the death of his wife, which is analogous to the action for the death of the father (*Union Govt. v. Warneke*, 1911 A.D. 657). Patrimonial loss only can be recovered, with no allowance for mental suffering or loss of consortium (cf. *Abbott v. Bergman*, 1922 A.D. 53, and the section above on Injury to Wife): the principal item of damage would usually be the **loss of the services** and assistance of the wife in the maintenance and upbringing of the children. In *Rawles v. Barnard*, 1936 C.P.D. at 79, where there was evidence of such loss, and also of the loss of assistance in husbandry operations, the Court approved an award of £147. The husband must prove actual loss before he can recover for the death of his wife, but this does not mean that he must show indigency or inability to support himself before he will be allowed to recover (*Gildenhuys v. Transvaal Hindu Educational Council*, 1938 W.L.D. 260).

A wife, married out of community of property, owes a legal duty to assist her husband in his business if such assistance is essential to the upkeep and maintenance of the joint household. If, therefore, he has been deprived of that right through the negligence of a wrongdoer, and in consequence has suffered pecuniary loss, he has a right to sue for damages (*Plotkin v. Western Assurance Co., Ltd. and another*, 1955 (2) S.A. 385 (W) at 393–5).

(c) DEATH OF MOTHER

Where the father is dead, or otherwise unable to support the children, the obligation falls on the mother; in fact the obligation may arise to assist in such support even where the husband is able to do his part (see per

Innes J. in *Warneke's* case, 1911 A.D. at 668). Where therefore the children can show the existence of the duty to support, and that they were dependent upon the support of their mother in whole or in part, they will have an action for patrimonial loss sustained by her death. In *Young v. Hutton* 1918 W.L.D. 90, a major son, who had been incapacitated and who showed that he was, at her death, dependent on his widowed mother although he had not actually yet received any support from her, was awarded damages, but based only upon support for one year, since he had not proved the necessity for it for a longer period.

(d) DEATH OF CHILD

A parent clearly has a right of action for patrimonial loss suffered by reason of the death of his or her child, whether a major or a minor and this includes loss of prospective gains (*Jacobs v. Cape Town Municipality*, 1935 C.P.D. 474). But he or she is not entitled to damages for severe shock upon hearing of the child's death (*Layton v. Wilcox & Higginson*, 1944 S.R. 48, and *Bertram v. Central S.A. Railways*, 1905 T.H. 234). Nor may the parent claim damages for loss of present services rendered by a minor child since any benefit derived therefrom would be more than counter-balanced by the expenses of maintenance and schooling (*Bertram's* case (*supra*)) and, in this regard, any claim for prospective services would have to be supported by evidence that the parent would have become entitled to such services (*ibid.*).

In order to succeed the parent must allege and prove both that (a) support was actually afforded and (b) he was unable to support himself (*Waterson v. Maybery*, 1934 T.P.D. 210), i.e. that there was a legal duty on the child to support the parent (*Oosthuizen v. Stanley*, 1938 A.D. 322). The statement in the latter case that a minor child is under a duty to provide or contribute to his parent's support 'if he is able to do so' means if he is able to do so 'out of his own means' (*Anthony and another v. Cape Town Municipality*, 1967 (4) S.A. 445 (A.D.) at 454). In this case a child of 11 years had assisted his mother on several days a week in hawking fish for sale. She claimed damages for the loss of such services, but it was held (Holmes J.A. dissenting) that she was not entitled to succeed, by reason of the fact that such services arose from a parental command and not from a legal duty of such a kind as to be the subject of compensation, *ibid.*, at 455. (See also *Petersen v. South British Insurance Co., Ltd.*, 1964 (2) S.A. 236, and *Wigham v. British Traders Ins., Co.*, 1963 (3) S.A. 151 (W).)

A parent would, however, be entitled to his out-of-pocket expenses for the death of his child (cf. *Bellstedt v. S.A.R. & H.*, 1936 C.P.D. 399).

Where a husband has means to support his wife, the wife cannot compel a child of the parties to support her unless she satisfied the court that she has taken all reasonable steps to enforce her rights against her husband (*Manuel v. African Guarantee and Indemnity Co., Ltd.*, 1967 (2) S.A. 417 (R)). See also (1964) 81 S.A.L.J. 147.

JOINT TORTFEASORS

Where damage is due to the combined negligence of both defendants they will be liable jointly and severally (*Witham v. Marshall & Jackson*, 1957 (1) S.A. 4 (S.R.)).

The whole position of joint tortfeasors has now been dealt with by statute in Act No. 34 of 1956, which has now abolished the difference between joint wrongdoers and concurrent wrongdoers except if it can be shown that there was no concerted action between them and their acts have caused different items of damage. Thus in *Van den Bergh v. Parity Insurance Co., Ltd.*, 1966 (2) S.A. 621 (W), the plaintiff wife of the deceased claimed damages for the death of her husband against A for his negligent driving, whereby the deceased was thrown out of his car, and against B for negligently running over him and killing him while lying in the road. Here it was held that both defendants were liable in damages, since neither driver could exculpate himself from liability. See also *Kruger v. Van der Merwe*, 1966 (2) S.A. 266 (A.D.).

The Act (which has been adequately criticized by McKerron in his *Apportionment of Damages*) reads as follows:

2. (1) Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action. [This section vests the court with a wide and unlimited discretion to determine what in the particular circumstances is just and equitable in ordering the amount of contribution to be made by a joint tortfeasor (*Abrahamse v. Danek*, 1962 (1) S.A. 171 (C)). Where, however, two defendants are sued jointly and the court cannot say which one of them was negligent, if at all, the judgment should be one of absolution, since the onus is upon the plaintiff to establish the negligence of one or other or both defendants (*Eversmeyer (Pty.) Ltd. v. Walker and another*, 1963 (3) S.A. 384 (T)).]

(2) Notice of any action may at any time before the close of pleadings in that action be given—

(a) by the plaintiff;

(b) by any joint wrongdoer who is sued in that action, and such joint wrongdoer may thereupon intervene as a defendant in that action. [A husband, married in community of property, is not a 'joint wrongdoer', since he is not liable to his wife for damages jointly caused to her by his and defendant's negligence (*Kleinhans v. African Guarantee and Indemnity Co.*, 1959 (2) S.A. 619 (E) at 626-7); *Tomlin v. London & Lancashire Ins. Co.*, 1962 (2) S.A. 30 (N)). Moreover a son cannot be liable to his father *ex delicto* for medical expenses incurred by the father as a result of the son's own negligence and so become a 'joint wrongdoer' vis-à-vis his father in terms of this Act (*Saitowitz v. Provincial Insurance Co.*, 1962 (3) S.A. 433 (W)).]

(3) The court may on the application of the plaintiff or any joint wrongdoer in any action order that separate trials be held, or make such other order in this regard as it may consider just and expedient.

(4) (a) If a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice is given to him in terms of paragraph (a) of sub-section (2), the plaintiff shall not thereafter sue him except with the leave of the court on good cause shown as to why notice was not given as aforesaid.

(b) If no notice is under paragraph (a) or (b) of sub-section (2) given to a joint wrongdoer who is not sued by the plaintiff, no proceedings for a contribution shall be instituted against him under sub-section (6) or (7) by any joint wrongdoer except with the leave of the court on good cause shown as to why notice was not given to him under paragraph (b) of sub-section (2). [If, however a knowledge of the identity of the wrongdoer came to the ears of the applicant only during the trial of the first wrongdoer, the court will permit the applicant to sue the second wrongdoer (*Lincoln v. Ramsaran*, 1962 (3) S.A. 374 (D)).]

(5) In any subsequent action against another joint wrongdoer, any amount recovered from any joint wrongdoer in a former action shall be deemed to have been applied towards the payment of the costs awarded in the former action in priority to the liquidation of the damages awarded in that action.

(6) (a) If judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, subject to the provisions of paragraph (b) of sub-section (4), recover from any other joint wrongdoer a contribution in respect of his responsibility for such damage of such an amount as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and to the damages awarded.

(b) The period of extinctive prescription in respect of a claim for a contribution shall be twelve months calculated from the date of the judgment in respect of which a contribution is claimed or, where an appeal is made against such judgment, the date of the final judgment on appeal: Provided that if, in the case of any joint wrongdoer, the period of extinctive prescription in relation to any action which may be instituted against him by the plaintiff, is governed by a law which prescribes a period of less than twelve months as the period within which legal proceedings shall be instituted against him or within which notice shall be given that proceedings will be instituted against him, the provisions of such law shall apply *mutatis mutandis* in relation to any action for a contribution by a joint wrongdoer, the period or periods concerned being calculated from the date of the judgment as aforesaid instead of from the date of the original cause of action.

[As to the running of prescription see *Commercial Union Assurance Co., Ltd. v. Pearl Assurance Co., Ltd.*, 1962 (3) S.A. 856 (E). Here the plaintiff had given notice to the defendant as a joint wrongdoer in terms of section 2(2)(b) of the Act more than two years after the collision, but the defendant had not intervened in the action. Thereafter the plaintiff acknowledging its liability to the passenger of the car had paid her a sum representing her damages, and then claimed from defendant a contribution of half of the amount paid. The defendant pleaded in bar that the action had become prescribed by virtue of section 11(2) of Act No. 29 of 1942 and plaintiff excepted to the defendant's plea. Held, that the exception had been well taken.]

(c) Any joint wrongdoer from whom a contribution is claimed may raise against the joint wrongdoer who claims the contribution any defence which the latter could have raised against the plaintiff.

(7) (a) If judgment is in any action given against one or more joint wrongdoers in respect of the damage suffered by the plaintiff, any joint wrongdoer who in pursuance of such judgment pays to the plaintiff in respect of his responsibility for such damage an amount in excess of the amount (hereinafter referred to as the amount apportioned to the firstmentioned joint wrongdoer) which the court deems just and equitable having regard to the degree in which he was at fault in relation to the damage suffered by the plaintiff and to the full amount of the damages awarded to the plaintiff, may, subject to the provisions of paragraph (b) of sub-section (4), recover from any other joint wrongdoer a contribution in respect of the latter's responsibility for such damage of an amount not exceeding so much of the amount which the court deems just and equitable having regard to the degree in which such other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff and to the full amount of the damages awarded to the plaintiff, as has not been paid by such other joint wrongdoer to the plaintiff or to any other joint wrongdoer, or so much of the amount paid by the firstmentioned joint wrongdoer as exceeds the amount apportioned to him, whichever is less.

(b) The provisions of paragraphs (b) and (c) of sub-section (6) shall apply *mutatis mutandis* to any claim for a contribution under paragraph (a) of this sub-section.

(8) (a) If judgment is in any action given in favour of the plaintiff against two or more joint wrongdoers, the court may—

(i) order that such joint wrongdoers pay the amount of the damages awarded jointly and severally, the one paying, the other to be absolved [see *Kruger v. Van der Merwe*, 1966 (2) S.A. 266 (A.D.), and *Saitowitz v. Provincial Insurance Co., Ltd.*, 1962 (3) S.A. 443 (W) at 445];

(ii) if it is satisfied that all the joint wrongdoers have been joined in the action, apportion the damages awarded against the said joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and give judgment separately against each joint wrongdoer for the amount so apportioned: Provided that any amount which the plaintiff is unable to recover from any joint wrongdoer under a judgment so given (including any costs incurred by the plaintiff in an attempt to recover the said amount and not recovered from the said joint wrongdoer) whether by reason of the said joint wrongdoer's insolvency or otherwise, may be recovered by the plaintiff from the other joint wrongdoer or, if there are two or more other joint wrongdoers, from those other joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each of those other joint wrongdoers was at fault in relation to the damage suffered by the plaintiff;

(iii) where it gives judgment against the joint wrongdoers jointly and severally as aforesaid, at the request of any one of the joint wrongdoers, apportion, for the purposes of paragraph (b), the damages payable by the joint wrongdoers *inter se*, amongst the joint wrongdoers, in such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff;

[See also *Crawhall v. Minister of Transport and another*, 1963 (3) S.A. 614 (T) at 619; *Saitowitz v. Provincial Insurance Co., Ltd.*, 1962 (3) S.A. 433 (W) at 455.]

(iv) make such order as to costs as it may consider just, including an order that the joint wrongdoers against whom it gives judgment shall pay the plaintiff's costs jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful joint wrongdoers pays more than his *pro rata* share of the plaintiff's costs, that he shall be entitled to recover from each of the other unsuccessful joint wrongdoers his *pro rata* share of such excess.

(b) Any joint wrongdoer who pays more than the amount apportioned to him under sub-paragraph (iii) of paragraph (a) may recover from any joint wrongdoer who has paid less than or nothing of the amount so apportioned to him, a contribution of an amount not exceeding so much of the amount so apportioned to the lastmentioned joint wrongdoer as has not been paid by him, or so much of the amount paid by the firstmentioned joint wrongdoer as exceeds the amount so apportioned to him, whichever is less.

(c) The provisions of paragraph (b) of sub-section (6) shall apply *mutatis mutandis* to any claim for a contribution under paragraph (b) of this sub-section.

(9) If judgment is given in favour of any joint wrongdoer or if any joint wrongdoer is absolved from the instance, the court may make such order as to costs as it may consider just, including an order—

- (a) that the plaintiff pay such joint wrongdoer's costs; or
- (b) that the unsuccessful joint wrongdoers pay the costs of the successful joint wrongdoer jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful joint wrongdoers pays more than his *pro rata* share of the costs of the successful joint wrongdoer, that he shall be entitled to recover from each of the other unsuccessful joint wrongdoers his *pro rata* share of such excess, and that if the successful joint wrongdoer is unable to recover the whole or any part of his costs from the unsuccessful joint wrongdoers, that he shall be entitled to recover from the plaintiff such part of his costs as he is unable to recover from the unsuccessful joint wrongdoers.

(10) If by reason of the terms of an agreement between a joint wrongdoer and the plaintiff the former is exempt from liability for the damage suffered by the plaintiff or his liability therefor is limited to an agreed amount, so much of that portion of the damages which, but for the said agreement and the provisions of paragraph (c) of sub-section (6) or paragraph (b) of sub-section (7), could have been recovered from the said joint wrongdoer in terms of sub-section (6) or (7) or could have been apportioned to him in terms of sub-paragraph (ii) or (iii) of paragraph (a) of sub-section (8), as exceeds the amount, if any, for which he is liable in terms of the said agreement, shall not be recoverable by the plaintiff from any other joint wrongdoer.

[Where the agreement of settlement is ambiguous extrinsic evidence is admissible to explain its terms (*Prinsloo v. Du Preez N.O.*, 1965 (4) S.A. 300 (W)).]

(11) (a) Whenever a joint wrongdoer who is entitled under any provision of this section to recover a contribution from another joint wrongdoer, is unable to recover that contribution or any amount thereof from that other joint wrongdoer, whether by reason of the latter's insolvency or otherwise, he may recover from any other joint wrongdoer such portion of that contribution or that amount thereof as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff and to the full amount of the said contribution or the said amount thereof, as the case may be.

(b) Any costs incurred by a joint wrongdoer in an attempt to recover any contribution from any other joint wrongdoer, and not recovered from that joint wrongdoer, shall for the purpose of paragraph (a), be added to the amount of that contribution.

(12) If any joint wrongdoer agrees to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, the provisions of sub-section (6) shall apply *mutatis mutandis* as if judgment had been given by a competent court against such joint wrongdoer for that sum of money, or, if the court is satisfied that the full amount of the damage actually suffered by the plaintiff is less than that sum of money, for such sum of money as the court determines to be equal to the full amount of the damage actually suffered by the plaintiff, and in the application of the provisions of paragraph (b) of the said sub-section (6), any reference therein to the date of the judgment shall be construed as a reference to the date of the agreement.

(13) Whenever judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, or whenever any joint wrongdoer has agreed to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, and the judgment debt or the said sum of money has been paid in full, every other joint wrongdoer shall thereby also be discharged from any further liability towards the plaintiff.

(14) A person shall for the purposes of this section be regarded as a joint wrongdoer notwithstanding the fact that another person had an opportunity of avoiding the consequences of his wrongful act and negligently failed to do so.

3. The provisions of section *two* shall apply also in relation to any liability imposed in terms of the Motor Vehicle Insurance Act, 1942 (Act No. 29 of 1942,) on the State or any person in respect of loss or damage caused by or arising out of the driving of a motor vehicle.

JOINDER OF PLAINTIFFS

An application by a defendant for a consolidation of actions brought against him by three separate plaintiffs, in respect of the same collision, will only be granted if there is no possibility of prejudice being suffered by any party (*New Zealand Insurance Co. v. Stone and others*, 1963 (3) S.A. 63 (C)). In this case the application was refused.

TRANSMISSIBILITY OF ACTION

(a) PASSIVE TRANSMISSIBILITY

The *actio legis Aquiliae* is passively transmissible, and can be brought against the executor of the person responsible for the damage, irrespective of such questions as *litis contestatio* and benefit to the estate (Voet 9.2.12; Grot. 3.32.10). The doubt expressed in *Conradie v. Gray*, 23 N.L.R. 303, is, it is submitted, mistaken. See Herstein and Van Winsen, pp. 165–6.

(b) ACTIVE TRANSMISSIBILITY

Has the executor an action for damages, in addition to the action available to the dependants? Not for the death itself, though possibly for funeral expenses (Grot. 3.32.2; Van Leeuwen 2.2.82). It seems, however, that if a man is injured by negligence and dies from some other cause before commencing action, his executor would have an action for *patrimonial loss* caused to the estate (compare *Engelbrecht v. Van der Merwe*, 10 N.L.R. 117, cited by *Wessels on Contract*, vol. 1, secs. 1673–4). See also *Lockhat's Estate v. North British & Mercantile Insurance Co., Ltd.*, 1959 (3) S.A. 295 (A.D.) (*ante*, p. 278). In regard to claims for compensation for pain, suffering, disfigurement and the like, however, it seems that, as such actions are primarily for the *solatium* of the deceased only, these claims would perish with the death of the party injured for, were it not so, the award of damages would only serve the purpose of swelling the inheritance accruing to the heirs of the injured party (*Hoffe N.O. v. S.A. Mutual, Fire & General Insurance Co.*, 1965 (2) S.A. 944 (C) at 955. See also *Lockhat's Estate (supra)*; *Jankowiak and another v. Parity Insurance Co. (Pty.) Ltd.*, 1963 (2) S.A. 286 (W) at 288–9). In *Hoffe's* case (*supra*) Van Winsen J. specifically refrained from deciding whether the position would be different if *litis contestatio* had taken place. But now it is clear that the rights claimed in *litis contestatio* are transmissible to the estate (*Potgieter v. Rondalia Ass. Corpn. of S.A., Ltd.*, 1970 (1) P.H., J. 7 (N)).

An executor of a deceased estate is not obliged to enforce a right of action and collect money owing to the estate, for he can award the right of action to the residuary heirs and cede it to them as part of their inheritance (*Elizabeth Nursing Home (Pty.) Ltd. v. Cohen and another*, 1966 (4) S.A. 506 (D)).

PART II

RUNNING-DOWN CASES AND COLLISIONS

CHAPTER XIV

COLLISIONS IN GENERAL

SUMMARY

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GENERAL PRINCIPLE

The number of decisions, relating to accidents and damage caused by motor vehicles and other road-users, are so numerous as to justify a separate consideration in this work and, although the test is always that of a *bonus paterfamilias*, the ever increasing toll of deaths on public highways is so great that the courts have concluded that the degree of care, required of the driver in question, is an extremely high one (*S. v. Stavast*, 1964 (3) S.A. 617 (T)). This type of case, however, while presenting extremely difficult problems of fact, is in many cases amenable to some appropriate principle or guiding factor of relative simplicity.

Briefly, the public highways are for the coming and going of all members of the public without discrimination. However a man may choose to proceed, whether by foot, by horse-drawn vehicle, by tram, bicycle or motor-car, he is subject to the same general duty and enjoys the same general right—the general duty to behave towards others as a reasonable and prudent man and the general right to expect that others will so behave towards him, and will have a like regard for his safety (*Baratz v. Johannesburg Municipality*, 1913 T.P.D. 738). No one section of the public has in general any paramount right to the road, for there is no trace in our law of the supposed doctrine that since the pedestrian was first on the road

he has the prior claim thereto. All are equally entitled to use the roads, and each must exercise his privileges with due regard to the rights of others (*Ford v. Town Hall Bottle Store*, 1926 W.L.D. 214).

Such is the general principle. But its application to particular users of the roads will vary according to the circumstances. The duty to show care is always a duty to show such care for one's own welfare and for the safety of others as is reasonable in the circumstances, and the circumstances affecting a pedestrian are widely different from those affecting the driver of a motor-car just as the conditions of the latter differ from those of the tram-driver or engine-driver.

AUTHORITY OF DECIDED CASES

It has been asserted that previous decided cases are of little or no assistance in coming to a conclusion as to negligence or blameworthiness in a particular dispute submitted for decision, for it is rare indeed that one can find the facts of one case fitting completely with the facts of another. Nevertheless, there are to be found many guiding principles in the host of decided cases in reference to negligent driving which are firmly established and deserving of recognition, such as, for example, that it is wrongful to overtake and pass another car on the crest of a hill or to enter an intersection past a blind corner without first slowing down in order to see whether one can do so with safety. In *R. v. Jones*, 1949 (1) P.H., O. 11 (N), and *R. v. Wells*, 1949 (3) S.A. 83 (A.D.), the view was taken that decided cases are valuable for the principles of law which they set out, but that it is idle to see how far the special facts of two cases coincide; moreover, each case must depend on its own facts, and inferences drawn from a certain set of facts cannot safely be drawn from somewhat similar events in different circumstances (see *Nolutshungu v. Alliance Assurance Co.*, 1952 (4) S.A. 155 (A.D.) at 161; *Venter v. London & Lancashire Ins. Co.*, 1951 (4) S.A. 554 (A.D.) at 560). Thus in *Morris v. Mayor of Luton* [1946] 1 All E.R. 1 it was held that it is often dangerous to extract propositions of law which are applicable in certain sets of facts and to apply those propositions to cases where the facts are different, for each case is dependent on its own particular facts. See also *McLaughlan v. Barnes*, 1954 (4) S.A. 503 (S.R.); *De Beer v. Todd*, 1955 (1) S.A. 639 (S.R.) at 642.

However, it is submitted that it is possible to weave some sort of system of general principles which may form the working basis, or yardstick, with which to measure the conduct of the parties in any particular case; see *Manderson v. Century Insurance Co.*, 1951 (1) S.A. 533 (A.D.), where Van den Heever J.A., in criticizing the dictum in *Morris v. Mayor of Luton* (*supra*) as being an overstatement, said (at 540):

'While findings of fact and reasoning upon which they are based should not lightly be elevated to rules of law, a consideration which has frequently been successfully urged in exculpation or a distinction which has repeatedly been drawn acquires the authority of a legal principle; in no department of law is this more apparent than in the law of negligence. But for this apotheosis the law would, apart from legislative interference, have remained static.'

TREATMENT

In the treatment of collisions on land it is convenient to deal with the various aspects of the problem from the point of view of the nature of the

vehicle engaged in occupying the highway. These may, for purposes of simplification, be classified into (a) trams, (b) trains, and (c) other vehicles (of which motors are the most important), and may be examined from both points of view, namely, that of their rights and that of their duties. The pedestrian owes a duty primarily to himself, and this aspect is dealt with separately (*post*, pp. 406–9).

MOTOR VEHICLES

Motor vehicles, for the purpose of this treatise, include all vehicles driven by a motor engine and designed or adapted for propulsion on a public road, but would, in Rhodesia, include bicycles under the definition of 'vehicle' in Cap. 289 (*R. v. Wilson*, 1966 (1) S.A. 388 (S.R.)). Thus a lorry remains a 'motor vehicle' for the purpose of the licensing regulations, even though it has for some months been unable to proceed under its own power and was at the time being towed along a public road by another vehicle (*R. v. Kaperi*, 1960 (2) S.A. 163 (F.S.C.)). In the Orange Free State it was at one time ruled that a trailer was not a motor vehicle (*R. v. Erasmus*, 1954 (4) S.A. 1 (O), and *Mathie v. Yorkshire Insurance Co., Ltd.*, 1954 (4) S.A. 731 (O)), but these decision are no longer of application in view of the present definition in the Ordinances. Nor would the decision in *R. v. Forde*, 1949 (2) S.A. 92 (N), which ruled that a tractor was not a motor vehicle be valid under the present Ordinances. In this work it is proposed to deal with all vehicles on public roads whether impelled by mechanical, human or animal power, since the basic principles regarding care and negligence are fundamentally the same although, in some instances, a distinction would have to be made in regard to the degree of care, to be expected of the driver, having regard to the great speed at which motor vehicles can be driven (cf. *S. v. Stavast*, *post*, p. 288).

CRIMINAL AND CIVIL ACTIONS

Is there any distinction to be drawn between the **degree of care** to be shown in regard to the driving of motor vehicles in so far as civil liability and criminal responsibility for one's actions are concerned? In other words, how far is it competent to apply the rules laid down by the courts as to the degree of care required of an individual in certain circumstances in a civil case, to criminal cases and vice versa? In this respect the law in South Africa differs from the English law, for under the latter system the tendency is to hold that before a party may be convicted on a criminal charge it will be necessary for the Crown to show that he has been guilty of some dereliction of duty amounting almost to gross negligence (*Akerele v. The King* [1943] A.C. 255). In South Africa there is no such distinction: *R. v. Swanepoel*, 1945 A.D. 444, following *R. v. Meiring*, 1927 A.D. 41 at 46, where Innes C.J., after examining the leading Roman-Dutch authorities, said:

'A consideration of these and other authorities does not, I think, justify us in drawing a hard and fast distinction between the negligence necessary to establish liability in civil and criminal cases respectively. In civil actions we have adopted, as the simple test, that standard of care and skill which would be observed by a reasonable man. And it seems right as well as convenient to apply the same test in criminal trials. . . . The importance of the possible consequences to the accused

and the high degree of assurance required will always invest criminal proceedings with a greater gravity than would surround a civil suit for the same act. But **the test of liability should be the same in both.**'

This decision was applied in *R. v. Freeman*, 1931 N.P.D. 460. See, also, *R. v. Clark*, 1924 N.L.R. 343; *R. v. Lennet*, 1917 C.P.D. 444, and *R. v. Higgs*, 1930 E.D.L. 239; *R. v. Botha*, 1940 S.R. 59 at 60; *R. v. Victor*, 1943 T.P.D. at 82; *R. v. Mhlongo*, 1948 (1) S.A. 1109 (T), and *R. v. Wells*, 1949 (3) S.A. 83 (A.D.). (See also *post*, p. 508.)

There is also a further distinction between the two types of cases in that in a civil case some injury or damage to the plaintiff is a *sine qua non* to liability on the part of the defendant, whereas in criminal trials a person may be charged and convicted even though no actual accident or collision had taken place for the sole question in penal cases is whether or not the accused has driven his vehicle negligently (*R. v. Cooper*, 1938 N.P.D. 172).

(1) ONUS

While the burden of proof in civil trials rests on the plaintiff to establish his case upon a balance of probabilities, in criminal cases the onus is upon the State to satisfy the court beyond all reasonable doubt as to the guilt of the accused (*R. v. Du Plessis*, 1936 A.D. 124; *R. v. Meiring*, 1927 A.D. 41 at 46). Furthermore, in criminal trials, where the issue depends upon inferences, or presumptions of fact, such inferences must be to the exclusion of all other inferences (*R. v. Blom*, 1939 A.D. 188 at 203) in contradistinction to civil trials where, in balancing the probabilities, the judicial officer may select a conclusion which seems to be the more natural, or plausible, conclusion from among several conceivable ones, even although that conclusion is not the only reasonable one (*R. v. Sacco*, 1958 (2) S.A. 349 (N) at 352).

On the other hand, it has been said by Steyn J. in *S. v. Stavast*, 1964 (3) S.A. 617 (T), that, having regard to the dreadful and almost daily toll of human life and limb that motor vehicles exact on our roads, the court should be astute not to diminish but rather to raise the standard of care and precautions that should be taken by drivers in the interests of public safety, while Schreiner J.A. in *R. v. Barnado*, 1960 (3) S.A. 552 (A.D.), has said that the only way to remind drivers of the high degree of care required of them, where a person is unlawfully killed, appears to be by prison sentences. This opinion is, however, not a rule of law and may be departed from in proper cases (*R. v. Bredell*, 1960 (3) S.A. 558 (A.D.) at 560).

(2) RECKLESS OR NEGLIGENT DRIVING

In determining whether a sentence of **imprisonment** should be imposed upon a driver the court will, in general, have regard to the conduct of the accused as to whether his acts or omissions were merely negligent or inadvertent on the one hand or whether there has been recklessness on his part on the other (*R. v. Swanepoel*, 1945 A.D. 444). In this regard Centlivres J.A. is reported to have said in *R. v. Mahametza*, 1941 A.D. 83 at 86:

'We do not disagree with the view that imprisonment is an appropriate punishment in cases of recklessness if by "recklessness" is meant gross negligence or wilful disregard of the rights of other road users, as, for example, in the case of numbers

of accidents which are caused by the dangerous practice of "cutting in", or driving round a blind corner on the wrong side of the road, or passing another car on the crest of a hill'.

(To this may be added the conduct of driving under the influence of liquor (*R. v. Roopsingh*, 1956 (4) S.A. 509 (A.D.)). (See also *post*, p. 295.)

(3) DEGREES OF CULPA

In civil trials, as has been pointed out *supra* at p. 68, damages are apportioned according to the degree of the fault found in the conduct of the respective opposing parties. In criminal prosecutions clear distinctions have been drawn, for purposes of punishment, between 'negligent driving' and 'driving recklessly' (see section 138 of the ordinances) which define the latter as driving with 'wilful or wanton disregard for the safety of persons or property'. Another and lesser type of culpability is that of driving 'without reasonable consideration' for other road-users (section 139).

In regard to 'reckless driving' it had been held that, before an accused person could be convicted of this type of offence, it must be shown that he had had a 'consciousness of danger and an indifference to the possible results of his conduct', that is to say the manner of his driving was both conscious and deliberate (*R. v. Racussen*, 1959 (3) S.A. 550 (E); *S. v. Grobler*, 1964 (2) S.A. 776 (T); *R. v. Ellis*, 1959 (4) S.A. 497 (S.R.)). Such tests of a 'consciousness of possible results' was queried by Watermeyer J. in *Van Zyl v. S.*, 1968 (2) P.H., O. 48 (O), where, after a consideration of the decisions in *R. v. Greenland*, 1962 (1) S.A. 51 (S.R.), and *S. v. Grobler* (*supra*), he concluded that the term 'reckless' driving meant nothing more than 'serious or gross negligence'. Nevertheless De Villiers J., in *Van Heerden v. S.*, 1968 (2) P.H., O. 58 (O), equated recklessness with 'bewustheid van gevaar maar onverskillig teenoor die moontelike gevolge van sy handelinge optree'. The matter eventually came before the Appellate Division in *S. v. Van Zyl*, 1969 (1) S.A. 553 (A.D.), when it was ruled (at 558-9) that 'conscious negligence' was not necessarily an ingredient of 'reckless' driving, and that the term is inappropriate and could cause confusion. It is certainly 'gross negligence' (i.e. *culpa lata*) (*R. v. William*, 1957 (2) S.A. 531 (S.R.) at 533; *R. v. Usiye*, 1958 (2) S.A. 379 (S.R.), and *R. v. Phillipson*, 1957 (1) S.A. 114 (S.R.)). Accordingly reckless driving can occur even at low speeds, as where a driver, being on the extreme right-hand lane of traffic (from which he is not permitted to turn left), shoots forward and turns left across the line of traffic on his left as soon as the traffic lights turn green in his favour (*R. v. Makings*, 1969 (1) P.H., H. (S.) 26 (R.A.D.)).

(4) WHO IS A 'DRIVER'?

Under the previous Provincial Ordinances the definition of a 'driver' included persons 'in charge' of a motor vehicle, but this definition has been altered by the present Ordinances, which stipulate that 'driver' now means the person who drives or attempts to drive a motor vehicle. It follows that the decisions in *R. v. Lamont*, 1939 E.D.L. 234, and *R. v. Benson*, 1940 E.D.L. 58, are no longer applicable. The question has frequently arisen in cases where a person has been charged with the

offence of driving while under the influence of intoxicating liquor and where it has been held that where the vehicle is not in a propellable condition (e.g. where the front wheel had burst) or where a person, finding himself to be under the influence of alcohol, decides not to drive but to remain in the stationary car, either awake or asleep, until he is no longer under the influence of the intoxicant, he could not be found guilty of the said offence since the vehicle in question was not in motion or moving at the time. (*R. v. Van Aswegen*, 1959 (1) S.A. 571 (O) (following *R. v. Theron*, 1946 T.P.D. 68 at 70); *R. v. Tiefel*, 1946 N.P.D. 123; *R. v. Wena*, 1953 (2) S.A. 351 (C); *R. v. Makolota*, 1960 (2) S.A. 500 (E); *S. v. Vorster*, 1968 (2) S.A. 59 (O)). The criterion of the vehicle's being in motion at the relevant time was also applied in a case under the Motor Vehicle Insurance Act in *Wells v. Shield Insurance Co., Ltd.*, 1965 (2) S.A. 865 (C), where it was held that the word 'driving' means urging or directing the course, and general control, of a vehicle. Consequently, where damage had been caused in a collision while the plaintiff's vehicle was stationary, with the engine switched off and the brake applied and when he was in the process of opening the door of his car, he could not be said to have been driving a vehicle within the meaning of the Act.

Where, therefore, the owner of a motor-car had handed over the car to a mechanic, who was temporarily absent, it was decided that he was not the 'driver' merely because he had slumped down into the driver's seat during the mechanic's absence (*R. v. Bekker*, 1952 (3) S.A. 505 (E)). Again, where it was found that the driver had left his car, with the petrol tank empty, at the side of a road and went away and later returned in an intoxicated condition, the court ruled that he could not be convicted of 'driving under the influence of liquor' (*R. v. Trollope*, 1945 S.R. 119).

It is not necessary, however, that the engine of the motor vehicle should have been switched on since a person can be said to have been driving when his vehicle was moving under the force of gravity (*R. v. Cele*, 1958 (2) S.A. 300 (N)). Again it has been ruled that, retrospectively considered, the accused must have been under the influence of intoxicating liquor although, at the time, his vehicle was not in motion but its engine was switched on, its lights burning and when he was in the process of endeavouring to move his vehicle out of a ditch and where there was evidence that he had previously taken liquor on an empty stomach (*R. v. Tredoux*, 1956 (3) S.A. 278 (C)), or where he had been found, in an intoxicated condition, trying to start his car (*R. v. Todd*, 1958 (1) S.A. 680 (C)). See also *R. v. Ferreira*, 1953 (1) S.A. 593 (O).

Section 140(2)(b) of the various Ordinances now provides that it is an offence to occupy the driver's seat with the engine running while under the influence of intoxicating liquor as prescribed (i.e. not more than 0.15 per cent of alcohol in his blood). For cases where the evidence clearly established that the driver was attempting to drive his car see *R. v. Booyens*, 1961 (1) S.A. 751 (O); and *R. v. Sharp*, 1957 (3) S.A. 703 (C).

Presumption

Section 155 of the various Ordinances stipulates that, in any prosecution under the ordinance, it shall be presumed until the contrary is proved that the owner of the motor vehicle was the driver thereof.

(5) TWO DRIVERS?

It is possible for two persons both to be drivers of a motor-car at the same time, as where A sits with his left hand on the wheel and his right hand on the hand-brake while B sits in the driver's seat using the accelerator and the foot-brake (*Langman v. Valentine* [1952] 2 All E.R. 803 (Q.B.)).

(6) WITNESSES—PRONENESS TO RECONSTRUCTION

Usually, accidents and collisions occur with such startling and unexpected suddenness that the minds of the witnesses have insufficient time to observe and register adequately the various incidents properly or to sift the sequence of events. There is, therefore, the ever-present danger of the tendency of the witness, in retrospect, to reconstruct the events of the collision, with the result that what is later deposed to in court is not what actually occurred but what the witness, or the driver, considers probably did happen, and this danger is greatly increased where the witness has an interest in the outcome of the proceedings, or has a bias, personal or general, against one or other of the parties. This psychological factor was recognized in *Lambrechts v. African Guarantee & Indemnity Co.*, 1955 (3) S.A. 459 (A.D.). It is submitted that it is in this type of case that the **real evidence** is most important. The spot of the collision is generally fixed by the place where broken glass or mud from the mudguards has been precipitated on to the street surface by the impact of the two vehicles. Again, if the car of A is alleged to have struck the car of B at right angles, and in the middle of B's car when travelling at some 25 m.p.h., the only conclusion is that B's car must have been pushed out of the line of travel which it was pursuing. This is a simple matter of physics. If, however, B's car was not pushed out of its normal line of travel but has continued in a straight line onwards, then the court must conclude that the witness who says that A's car was travelling at 25 m.p.h. is simply drawing on his imagination.

CLASSIFICATION AND DIVISION

No scientific method of classifying the multifarious problems and duties that beset the motorist has yet been evolved, and it is therefore proposed to treat of his rights and liabilities by summarizing the various decided cases regarding his duty in the following manner; that is to say, the duty of the driver as regards—

- (a) himself personally;
- (b) his car;
- (c) the place or locality where he is driving;
- (d) the time when he is driving;
- (e) the persons and animals on the road;
- (f) other vehicles generally.

CHAPTER XV

THE DRIVER'S DUTY REGARDING HIMSELF PERSONALLY

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1. TO BE LICENSED

It is not sufficient for a party in control of a vehicle to prove that he drove it with the greatest care of which he himself was capable; he must show, in addition, that he exercised a reasonable degree of **skill**, that is to say, such proficiency as an ordinary qualified and experienced driver would have shown in the circumstances. Obviously, if the legislature, for the safety of the general public, has prescribed that no motor vehicle may be driven on a public road without the driver thereof being licensed, the party who, nevertheless, undertakes to drive an automobile without having passed the necessary and, in these modern times, exacting tests for a driver's licence, takes the risk of being unable to control that vehicle in a proper manner, and his action in assuming this unwarranted responsibility is an aspect which may be considered by the court in coming to the decision whether he, at the time in question, exercised that reasonable degree of care and skill which the law demands of the driver of a fast-moving and

dangerous instrument. (*R. v. Victor*, 1943 T.P.D. 77). The absence of the driver's licence, however, does not **necessarily** warrant an inference of incompetence (*Keene v. Swale*, 1927 P.H., J. 21 (N)), even if it be a criminal offence under section 56 of the provincial Ordinances for the mere fact that a person is not licensed to drive a motor vehicle does not, in itself, show that he cannot drive safely or that he was aware of incompetence to drive (*S. v. Nehemia*, 1969 (1) P.H., H. (S.) 63).

2. TO EXERCISE SKILL

Besides being qualified to exhibit reasonable skill it is the duty of the driver to **demonstrate** that skill. The principle is contained in the phrase *imperitia culpa adnumeratur*, or, as Salmond, p. 36, puts it: No one is bound by law to be a skilful and competent driver of horses, but everyone is bound not to drive horses unless he is skilful and competent in that regard.

This principle was followed in *Bezuidenhout v. Berman*, 1929 O.P.D. 148, where McGregor A.J.P. is reported to have said:

'Now in *McKenzie v. S.A. Taxi Cab Co.*, 1910 W.L.D. 23, Bristowe J. pointed out that "it is the duty of a person in control of an instrument, if an accident is imminent, to prevent it when possible by the exercise of ordinary care and diligence". I venture to concur with this clear and concise statement and, where the instrument in question is a motor-car, a thing compact of special mechanism and capable of inflicting direct injury, one might with advantage bear in mind that "care" would include such an amount of **skill** as might reasonably be expected of a person taking upon himself to drive a car, *imperitia culpa adnumeratur*.'

See also *R. v. Du Toit*, 1947 (3) S.A. 141 (A.D.), and *S. v. Claasen*, 1962 (3) S.A. 308 (O) at 310, where the dictum in *Du Toit's* case was cited as follows:

'A motor-car is not less dangerous than a mule waggon or a horse upon a public road and it cannot be too emphatically laid down that the driving of a car is a skilled occupation. The general realization of that fact might do something to diminish the appalling number of accidents.'

See also *Crofts v. Waterhouse* (1828) 1 Bing. 319; *McCrone v. Riding*, 30 Cox 670, and *R. v. Zonduyiza*, 1938 P.H., O. 12 (N), where the accused, who had never driven a motor-car before the day of the accident, was convicted of culpable homicide. In *R. v. Van Dijk*, 1939 E.D.L. 203, the learned Judge-President held that no indulgence can be shown to a driver, nor any allowance made for the fact that he had held a driver's licence for only five weeks, but that, on the contrary, his conduct must be judged by that of a reasonable man (see *ante*, p. 22, *R. v. Msimango*, 1950 (2) S.A. 205; and *post*, p. 314 hereof).

The word 'skill' is used in the wider sense and may not be equated merely with an ability to perform vehicular acrobatics, but rather in the sense of demonstrating alertness, concentration, foresight, attentiveness and an anticipation of what other road-users are doing or likely to do. A reasonable degree of knowledge of the rules of the road and laws relating to safe driving is implicit in the full concept of the word. In this regard it has been held that if the driver's attention is distracted by a passenger's rapping violently on the rear window of a truck he may not set such incident up as a reasonable excuse for taking his eyes off the road (*S. v. Smit*, 1963 (4) S.A. 824 (G.W.)). On the other hand, certain distractions cannot be

reasonably foreseen, as where a passenger in the rear of a vehicle suddenly opened the door thereof and screamed (*S. v. Mayne*, 1964 (1) P.H., O. 17 (O)). Here the driver was acquitted of negligent driving. On the other hand there is the curious decision in *S. v. Lombard*, 1964 (4) S.A. 346 (T), where it was found that a wasp (not a horse-fly as reported) flew in through the driver's window and stung her on the cheek. Here the Appeal Court decided that this was not a case of sudden emergency and that the correct decision should have been one of negligent driving but that a sentence of caution and discharge would meet the case. It is submitted, however, that her failure, in the circumstances to observe a stop-street sign was excusable and that she should have been acquitted on the charge of negligent driving. (See *post*, p. 314.)

The learner driver: The standard of care required of a learner driver is no different to that of an ordinary driver (*Rubie v. Faulkner* [1940] 1 K.B. 285 and *R. v. Van Dijk*, 1939 E.D.L. 203), although the rule is different in Rhodesia, where the driver is prosecuted under the Roads and Road Traffic Act (*R. v. Msongelwa*, 1960 (4) S.A. 699 (S.R.)), but this case laid down certain reservations namely (a) this ruling would not apply to an action for damages under the common law, (b) the result would be different if the accused's bad driving was due to a failure to exercise skill and (c) the driver could still be punished for his lack of skill in driving at a dangerous speed or in a manner dangerous to the public or without due care and attention.

Whether both the instructor and the learner driver can be deemed to have been 'in control' of the vehicle would depend on the actual degree of control of the instructor: Where the latter had his one hand on the hand-brake and the other on the steering wheel and was able to steer, stop and start the car with the ignition switch and hand-brake within his reach, then he could be said to be in control thereof (*Langman v. Valentine* [1952] 2 All E.R. 803 (Q.B.)), but otherwise not (*Evans v. Walkden* [1956] 3 All E.R. 64 (Q.B.)). See, also, *Masinda v. Tower Typewriter Co.*, 1961 (1) S.A. 795 (N).

3. DRIVER LOSING HIS NERVE

Closely allied with considerations of proficiency and skill is the aspect of remaining calm and steady and not losing one's nerve. For a demonstration of a lack of this quality a person is responsible in law if it can properly be attributed to him as a fault (*Haylet v. Steen*, 1936 P.H., O. 5 (T)). In this case a motor-car driven by defendant, in which the plaintiff was a passenger, collided with a telegraph pole on a country road about midnight. At the spot where the accident occurred is a bend which could easily be negotiated by a driver using ordinary care even at a reasonably high speed. The defendant had learnt to drive a car about six weeks prior to the accident and it was doubtful whether he had driven as much as 500 miles. This was his first experience of night driving on an unlighted country road. On the evidence it was clear that he had lost his nerve. When the car left the tarred part of the road unnecessarily and unintentionally he was disconcerted. He was in an agitated frame of mind when he grazed the whitewashed stones. When he regained the tarred part of the road he did so in a state of nerves. The headlights showed him bushes

on the right-hand side of the road, a sight which upset him and sent him towards the left; but such was his lack of control of the car that he drove straight for the telegraph pole. Defendant had the road entirely to himself, and there was nothing to occasion his mad career except his own alarm which gradually increased as he found himself in circumstances to which he was unaccustomed on a country road at night. Held, there had been *culpa* on his part and that the plaintiff was entitled to judgment for damages. See also *De Wet v. Adams*, 1935 T.P.D. 247, where the Court found, as an alternative to defendant's explanation as to how the accident took place, that he must have lost his nerve. In the case of *R. v. Storrar*, 1933 N.P.D. 110, it was established that the deceased had unaccountably and unnecessarily swerved to the right at an intersection, thereby colliding with the accused's car, and here the Court found that she must have lost her head and that the accused could not in the circumstances be said to have been to blame in any way for the accident. (See also *post*, p. 315.)

It follows that a driver cannot allow himself to be diverted by any hindrance or irritation and, even under difficult circumstances, he must not lose his head: *S. v. Smit*, 1963 (4) S.A. 824 (G.W.), where De Wet said, at 826:

'Die bestuur van 'n motorvoertuig verg 'n groot mate van behendigheid. Die bestuurder van sodanige gevaarlike voertuig kan nie toelaat dat hy van stryk gebring word deur enige hindernis of irritasie nie en moet selfs onder moeilike omstandighede nie sy kop verloor nie. Indien die bestuurder van sodanige voertuig dit nie met sodanige vaardigheid en bedraagsaamheid bestuur nie, kan dit op sigself nalatigheid aan sy kant openbaar—*imperitum culpa adnumeratur*.'

4. INFLUENCE OF LIQUOR—DRUNKENNESS

For a discussion as to whether a person can be said to have been driving, or been the driver of, a motor vehicle, see *ante*, pp. 289–90.

(a) MEANING OF 'UNDER THE INFLUENCE'

It is axiomatic that a person in control of a motor vehicle should not allow his driving ability to be impaired by the consumption of alcohol or a narcotic drug (section 140 of the various Ordinances). As to what constitutes being 'under the influence' of liquor there has been no inconsiderable controversy, but the rule is now clear that, in order to establish this fact, it is not necessary to prove that the driver was 'drunk and incapable'; it is quite sufficient to show that the intoxicating liquor the driver has consumed has influenced him to such an extent that (to put it in the words of Judge Sturgess, quoted in (1927) *S.A.L.J.* at 184 and followed in *R. v. Lloyd*, 1929 E.D.L. 270), 'The skill and judgment normally required in the manipulation of a motor-car is obviously diminished or impaired as a direct result of the consumption of alcohol'. With the elimination of the word 'obviously' this definition has received the approval of the Appellate Division in *R. v. Spicer*, 1945 A.D. 433 at 436, where it was also pointed out that the 'impairment of judgment' referred to covers the case 'of a driver on whom intoxicating liquor has induced an exuberant and over optimistic frame of mind which causes him to take risks'. The definition, as thus approved by the Appellate Division, is therefore authoritative. See also, *Agiakatsikas N.O. v. Rotterdam Insurance Co., Ltd.*, 1959 (4) S.A. 726 (C) at 729–80; *R. v. Donian*, 1935 T.P.D. 5; *R. v. Tathiah*, 1938 N.P.D.

387; *R. v. Magula*, 1939 E.D.L. 207. In *R. v. George Lane*, T.P.D. 5.3.1929, the Judge President said:

'In cases of this sort the court was not inquiring whether the accused was drunk or not, but whether he was under the influence of liquor. The point is whether he was so influenced by alcohol as to make a person who, in the opinion of the legislature, should not drive a motor-car, because circumstances might arise wherein such a person would not be able to extricate himself with ordinary skill. That was the test to be applied.'

The essence of the statutory offence of driving under the influence of liquor is that the alcohol or narcotic drug must have impaired, in some degree, the **driving efficiency** of the motorist, e.g. by dulling his vision, blunting his judgment, or by making his muscular reaction to communications from his brain sluggish (*R. v. Tathiah*, 1938 N.P.D. 387, and *R. v. Lewis*, 1947 (1) A.S.A.R. 261). A driver may be found guilty of the offence even if his condition was induced by a 'hang-over' as a result of the consumption of alcohol the previous night (*R. v. Cooper*, 1965 R.L.R. 609 (R.A.D.)).

In *R. v. Labilliere*, 1936 P.H., O. 3 (S.R.), it was opined that 'one might conceive of a tired driver having his faculties **improved** by a moderate alcoholic stimulant though he might be said to be under its influence', but this decision was dissented from in *R. v. Tathiah* (*supra*), for a man may still be under the influence of liquor where his muscular control has been impaired even though his mental activities are in order and alert, or even if **intensified by the exhilaration** resulting from the drink (*R. v. Magula*, 1939 E.D.L. 207). If, therefore, his muscular actions are impaired then it is a reasonable inference that his powers of manipulating a motor-car are diminished (*R. v. Spicer*, 1945 A.D. 433). See also *R. v. Proctor*, 1951 (4) S.A. 298 (T).

In July, 1935, the British Medical Association, after intricate tests, decided that there were—

'serious dangers in taking what would be the equivalent of a stiff drink to pull yourself together on a long journey. These would be (1) to diminish attention and control; (2) adversely to affect one's reasoning, and (3) the tendency to think, mistakenly, that one is driving with more than usual skill. . . . Alcohol leads many persons to make rapid decisions and take risks less judiciously than they would otherwise do. Motor driving, which involves a succession of highly skilled muscular movements, is dependent on rapid co-ordination of the eyes, hands and feet and it is found that the speed with which the gaze is directed to fresh objects is measurably impaired by drinking alcohol.'

(b) PROOF

In order to secure a conviction the State must establish beyond a reasonable doubt that the liquor consumed has impaired the driver's efficiency (*R. v. Brearley*, 1949 P.H., O. 20 (C)), and, where the State case is based on the **opinion** of witnesses who saw the driver, the evidence must be supported by **adequate reasons**, and this rule applies even if the witnesses are medical practitioners (*R. v. Theunissen*, 1948 (4) S.A. 43 (C), and *R. v. Jacobs*, 1940 T.P.D. 142). The State must prove that the accused's capacity to drive was in fact impaired by his indulgence in intoxicating liquor and not merely that his faculties were only impaired to an extent **likely** to affect his driving (*R. v. Brearley* (*supra*), and *R. v. Van Rhyn*, 1955 (2) P.H., O. 9 (C)).

In certain circumstances the mere fact that a person's muscular reactions are impaired may justify the inference that his ability to manipulate a car is diminished. But in a **criminal case** it is not sufficient that the inference is merely an inference which **can** reasonably be drawn. Before the court is entitled to draw such an inference it must be consistent with all the facts and must be the **only reasonable inference** to be drawn from all the facts (*R. v. Laubscher*, 1952 (2) P.H., O. 20 (C)).

The court will, therefore, scrutinize the reasons with great care. It is not necessary that the facts, as opposed to the opinion of the witnesses, establish a necessary inference that the driver was under the influence of liquor, for the court must have regard to both the opinion and the **reasons** (*R. v. Barry*, 1940 N.P.D. 130). A bare opinion without reasons is, if the question is disputed, of very little value, and if the reasons are incapable of supporting the opinion, that opinion ought to be rejected (*R. v. Theunissen*, 1948 (4) S.A. 43 (C)). In other words the opinion must be supported by the **facts** on which it is based (*R. v. Jacobs*, 1940 T.P.D. 142), and if the reasons are fairly capable of supporting the opinion the court may, not must, accept that opinion (*R. v. Barry* (*supra*); *R. v. Jacobs* (*supra*)).

The onus is upon the prosecution to establish that the impairment of the driver's ability to drive was caused by the consumption of alcohol and, if any other cause for that impairment be mooted, e.g. a disturbance of the driver's faculties, mental or physical as a consequence of concussion, then it is for the prosecution to exclude that it was not reasonably possible that that was the cause (*S. v. Piccione*, 1967 (2) S.A. 334 (N)). If, however, the defence is that of automatism, then the onus is on the defence to establish the fact by a balance of probabilities (*ibid.*). In this regard it has been held that a driver may not be convicted if, after the accident and before reporting to the police, he had consumed intoxicating liquor (*R. v. Scholles*, 1961 (3) S.A. 447 (C)), but the effect of this decision has now been nullified by section 135(1)(g) of the various Ordinances which stipulate he shall be guilty of an offence if he does take such alcohol or drug before he has been examined by a medical practitioner (if such examination is required by the police) and before he has given the necessary particulars as to his name and address, the address of the owner of the vehicle and the registration number of the motor vehicle, if required to do so by any person having reasonable grounds for demanding such particulars. He will be exculpated, however, if he partook of such alcohol on the instructions of, or when administered by, a medical practitioner in the case of injury or shock.

Medical evidence

The general rule is that the evidence of a doctor and a constable is adequate proof if sufficiently positive (*R. v. Schwartz*, 1938 P.H., O. 8 (S.R.), and *Van Staden v. R.*, 1938 P.H., O. 25 (O)). In *R. v. Mutch*, 1948 (3) S.A. 1053 (C), it was ruled that it is essential that the district surgeon, or doctor, give evidence in all cases of drunken driving. *Mutch's* case was distinguished in *R. v. Brorson*, 1949 (2) S.A. 819 (T), but followed in *R. v. De Villiers*, 1949 (3) S.A. 149 (E). See, also, *R. v. Woodliffe*, 1947 (2) S.A. 554, where it was decided that even if the accused pleads guilty, the State should, if it intends pressing for a sentence of imprisonment, call the

district surgeon or other medical evidence. Medical evidence should, moreover, be made available in every possible case (*R. v. Van der Merwe*, 1955 P.H., O. 5 (C)). The matter was again considered in *R. v. Ismail*, 1951 (1) S.A. 370 (T). The decision in *R. v. Viljoen*, 1946 P.H., H. 268 (C), where Sutton J. preferred the evidence of an experienced policeman to that of a medical practitioner, is, it is submitted, going too far (see *R. v. Stigant*, 1946 (2) P.H., O. 37 (T); *Commons v. R.*, 1952 P.H., O. 9 (C), and *S. v. Mhetoa*, 1968 (2) S.A. 773 (O) at 775), and is quite untenable, for, from the policeman's point of view, all that is required is that the suspect should smell of alcohol, stagger a little, and have a thick speech (whatever that may mean to a stranger). The policeman is quite incapable of distinguishing an alcoholic state from **epilepsy** or from the effects of one of the **barbiturates** (for which see *R. v. Innes Grant*, 1949 (1) S.A. (A.D.) at 760), or from an attack of **hypertension**, or from **Parkinson's disease**, **multiple sclerosis** or **Bright's disease**, if the suspect also happens to be smelling slightly of alcohol and hence the necessity of medical evidence. These factors and considerations were not considered in *R. v. Seaward*, 1950 (2) S.A. 704 (N), when it was opined that 'a policeman's evidence is more important and valuable than a doctor's'. (See also *post*, p. 300.)

Where the accused asks to be assisted by his own medical practitioner this should be done (*R. v. Moore*, 1955 (1) P.H., O. 2 (C); *R. v. Maguire*, 1954 (4) S.A. 187 (S.R.)). The police should, moreover, assist the accused in obtaining the services of his own medical practitioner when arresting him for being under the influence of liquor (*R. v. Ellis*, 1939 P.H., O. 31 (N)), and the accused should be told of his right to be examined by his own doctor (*R. v. Gquenta*, 1941 E.D.L. J/C 12/41; *R. v. Maguire*, 1954 (4) S.A. 187 (S.R.); *R. v. Francis*, 1940 E.D.L. 274)). He should, moreover, be examined as soon as possible (*R. v. Maguire (supra)*). Where a police officer is dissatisfied with the conclusions or opinion of one doctor and calls in another, it is the duty of the State to make the report of the first doctor available to the defence (*R. v. Mji*, 1956 (1) P.H., H. 57 (O)).

It is not sufficient for the medical officer merely to read out his report and then hand it in, for he must state on oath that he **ratifies**, or confirms or adopts the terms thereof (*R. v. Kannemeyer*, 1958 (3) S.A. 56 (C); *R. v. Mbongwe*, 1954 (3) S.A. 1016 (T) at 1108). His failure to do so can result in a setting aside of the conviction, as happened in *R. v. Birch-Monchrieff*, 1960 (4) S.A. 425 (T) at 427, and see also *R. v. Mashlangu*, 1947 (3) S.A. 576 (T).

The **tests** usually resorted to, in order to ascertain the sobriety or otherwise of the party concerned, are (a) speech; (b) walk; (c) smell of breath; (d) if pupils of the eyes are dilated; (e) handwriting; (f) pulse; (g) the bichromate test (urine); and (h) the typewriter test. In regard to the typing test the British Medical Association found that anyone who can operate the keyboard without mixing up the type is definitely sober. Eight men and five women were tested and it was found that 'three single' (i.e. about 3 ounces) produced an effect on all of them. Obviously the magnitude of the effect depends on the amount of food taken. Where no food was taken the typing mistakes doubled or trebled in number. See also *R. v. Van Zyl*, 1935 P.H., O. 27 (C).

Additional tests, suggested by Dr. Sydney Smith in his book on *Forensic Medicine*, are as follows:

(a) General demeanour; (b) state of clothing; (c) appearance of conjunctivae; (d) state of tongue; (e) manner of walking, turning sharply, sitting down and rising, picking up pencil or coin from the floor; (f) memory of incidents within the previous few hours and estimation of their time interval; (g) repetition of set words and phrases; (h) walking along a straight line; and (i) failure of the convergence of the eyes.

To which may be added such signs as flushing and symptoms of hiccups, nausea and behaviour curiosities such as kissing the police sergeant.

In regard to the examination of a driver suspected of being under the influence of alcohol or narcotic drug, it should be remembered that neither the police nor the district surgeon can compel the suspect to **do** anything or to **perform** any acrobatics, for *nemo tenetur se ipsum prodere*—no person may be obliged to give evidence against himself (*R. v. Camane*, 1925 A.D. 570, and *R. v. Matemba*, 1941 A.D. 75). He may not, however, refuse to be examined at all (*R. v. Cawood*, 1950 (4) S.A. 91 (E)). All he is required to do is to submit passively to whatsoever examination the district surgeon wishes to make (by section 64 of Act No. 19 of 1955). In terms of this Act the district surgeon is now entitled to take a specimen of the accused's blood for the purpose of ascertaining the percentage of alcoholic content therein. See also *R. v. Scott*, 1959 (2) S.A. 786 (C). The court is, however, not bound by such evidence of examination and opinion based thereon where there is other reliable evidence which conflicts with it (*Nathan N.O. v. Ocean Accident and Guarantee Corp., Ltd.*, 1959 (1) S.A. 65 (N); *Agiakatsikas v. Rotterdam Insurance Co., Ltd.*, 1959 (4) S.A. 726 (N)). See also *R. v. Nowell* [1948] 1 All E.R. 784.

One of the best tests is to determine the **percentage of alcohol in the blood** or blood-stream, and section 140(3) the various provincial Ordinances creates an offence if the blood in a driver's veins is not less than 0·15 per cent per 100 millilitres of blood. Such condition does not however mean that the culprit should be sentenced on the same basis as if he were, in fact, under the influence of liquor if there is no evidence that there was anything wrong with his ability to drive (*S. v. Barnard*, 1968 (1) S.A. 463 (N)). Moreover the doctor who, upon examination 1½ hours after the accused had been found by the police, states that the accused was under the influence of liquor ought also to relate his findings as to what the condition of the accused could, or would, have been at the time in question (*R. v. Horn*, 1960 (4) S.A. 8 (T) at 10–11; *S. v. Van Vught*, 1964 (1) S.A. 428 (C)), but see now section 140(3) of the Ordinances cited below. In the *S.A. Medical Journal* of 25th May, 1940, Dr. L. P. Bosman published the following facts: About half the population is affected by a concentration of 0·1 per cent of alcohol in the blood. This, in a man of about 150 lb, would be about three large whiskies or 3·5 pints of beer. A man with a percentage of 0·25 is definitely not fit to drive a car. An added advantage of the blood alcohol estimation is the fact that it can be taken some hours after the accident, for the rate of metabolism of alcohol is fairly constant and it can be calculated back what percentage of alcohol must have been in the blood at the time of the collision. He admits that the absorption is slower in the habitual drinker and therefore his tolerance is greater, but contends, nevertheless, that the concentration of alcohol in the blood affords an index of the minimum amount of alcohol consumed. Broadly these are as follows:

- (a) 0.0 to 0.08%—not under the influence of alcohol.
- (b) 0.1 to 0.15%—border-line cases.
- (c) 0.15 to 0.25%—definitely under the influence of alcohol.
- (d) 0.25 to 0.35%—very drunk.
- (e) 0.35 to 0.45%—paralytically drunk.
- (f) 0.45%—coma and on the verge of death.

It is submitted that absorption and effect would depend upon (a) food and (b) perspiration, as when a person has been dancing during the period of imbibing liquor.

A formula has now been devised by P. K. van Gent as $A = p \times c \times r$ where A = the total weight of alcohol in grams absorbed into the body tissues;

p = weight of the subject in kilograms;

c = blood alcohol % $\times 10$;

r = ratio of concentration of alcohol in the body to that in the whole blood, i.e. 0.67.

See *S.A. Medical Journal*, 21st September, 1957, where two tables are set out to assist in the computation. By making an allowance of 8 g or 10 cubic centimetres per hour for combustion it is possible to ascertain, in **retrospect**, how much alcohol must have been consumed during the relevant period.

In the United Kingdom the British Medical Association Committee agreed that the maximum was 80 milligrams per 100 millilitres of blood, which is equivalent to 2 to 2½ pints of beer or 4 to 5 tots of spirits, and this is also the limit fixed by statute in Sweden.

The mere smell of alcohol does not mean that the suspect is under its influence if his reactions may be attributable to, or reveal symptoms similar to, **Jackson's epilepsy**, or **hypertension**, or **Parkinson's disease** or **Bright's disease**, or to the effects of **luminal** (see *R. v. Innes Grant*, 1949 (1) S.A. (A.D.) at 760–3, and *R. v. Randell*, 1953 (1) P.H., O. 2 (E)). The medical history of the suspect should, therefore, be inquired into by the examining medical officer in order to ascertain whether the former had been receiving any treatment for the aforementioned complaints either privately or at an out-patients department of a hospital.

This necessity was illustrated in the case of *R. v. W. Nefdt*, C.P.D. 2nd June, 1947, the facts of which were that the appellant and two of his companions, after playing a game of billiards during which time they each consumed two glasses of beer at Cape Town, then drove down to Fish Hoek. Thereafter, after walking about for about fifteen minutes, he then drove them on the journey back to Cape Town. On the way, however, another motorist overtook him, in the face of an oncoming car, and cut in in front of him. This action, he said, induced a black-out with the result that he collided with, and killed, a pedestrian walking at the side of the road. After applying the usual tests the District Surgeon pronounced him to be under the influence of alcohol and he was accordingly convicted of the offence of culpable homicide. This case was reported in the local newspaper which was read by the specialist at Groote Schuur and who immediately recalled that the appellant was an out-patient of his. His affidavit to this effect was filed stating that a person suffering from Jacksonian epilepsy would, if he smelt of liquor, in all likelihood fail to comply satisfactorily with the usual clinical tests applied in order to ascertain whether or not a person was under the influence of intoxicating liquor. On appeal,

a special application was made for the hearing of this further evidence and the matter was remitted back to the magistrate for a rehearing with the result that the appellant was duly acquitted.

Another matter, in which the author was also concerned, was the trial of the retiring Station Master of Cape Town on a charge of driving under the influence of alcohol. He had attended a farewell dinner given in his honour, and had driven quite safely for three miles and complied with all the traffic lights on the way, when suddenly he had a black-out and drove into a telegraph pole at the side of the road. He said that he had had one whisky and had thereafter filled up his glass with ginger-ale. Upon examination shortly after the accident medical officer found that he was suffering from hypertension which would cause such fit due to his emotional state in bidding farewell to his erstwhile colleagues of many years' standing. The magistrate appeared highly sceptical of this defence until a certain State witness fainted in the witness box when giving evidence. At the request of the defence he was immediately examined by the District Surgeon, who was at the time present in court, and who then testified that this witness had also experienced a black-out due to hypertension caused by his nervousness when testifying in court.

A person may not be convicted of driving under the influence of liquor unless it is proved that he was in control of the steering apparatus and that the vehicle was in motion at the time (see *ante*, pp. 289-90).

The time factor: The time between the accident (or occasion of driving) and when the driver is examined is of importance for, if both are sufficiently proximate, the fact that **shortly before** the accident the driver was found to be drunk may create a presumption that he was drunk at the time of driving (*S. v. Lombard*, 1967 (3) S.A. 538 (A.D.) at 547). In *S. v. Nkosi*, 1967 (3) S.A. 547 (N), it was held that, since the blood does not immediately absorb the amount of alcohol actually imbibed and that some time must elapse before the alcohol is completely absorbed, the fact that after the collision the driver's blood-stream showed 0·17 per cent of alcohol, does not mean that, at the time of driving, it contained not less than 0·15 per cent of alcohol. See also the dissenting judgment of Milne A.J.A. in *S. v. Lombard (supra)* at 547 and *S. v. Mtembu*, 1961 (4) S.A. 152 (N) at 155, which was followed with approval in *S. v. Nkosi (supra)* at 548 and *R. v. Horn*, 1960 (4) S.A. 8 (T) at 10-11. These decisions must, however, be read in the light of the provisions of section 140(3) of the provincial ordinances which all provides that, in any prosecution for the offence of driving with not less than 0·15 per cent of alcoholic content in the blood, if it is proved that the driver's blood-stream revealed an excess of that amount, it shall be presumed, until the contrary is proved, that such excess existed within two hours of the said offence.

Where the appellant had been convicted of contravening section 140(3) of the Ordinance in driving a motor vehicle when the alcoholic content of his blood was not less than 0·15 per cent and the evidence showed that the district surgeon did not personally **sterilize** the syringe and needle to take the blood sample from the appellant but took it from a sealed package and assumed they had been sterilized, and where he was uncertain as to the content of the soap used to clean appellant's skin and was unable to exclude the possibility that it contained alcohol—matters which were put in issue at the trial—the Appeal Court allowed the appeal (*S. v. Pillay*, 1969 (2) S.A. 248 (N)). Similarly in *S. v. Ngcobo*, 1969 (1) S.A. 249 (N), it was ruled that the State had failed to establish that the sample of blood examined which had been put in a bottle containing some powder, was

pure and uncontaminated, since there was no explanation forthcoming as to the nature of the said powder.

In the Transvaal, section 14 of Ordinance No. 7 of 1968 now provides a presumption that the syringe and receptacle used by the analyst were free from any contamination which could have affected the analysis, until the contrary is proved. This piece of legislation has not yet received the attention of the courts, but it may well be asked, how can any legislature justly impose upon one ignorant party an onus of proving a fact which is peculiarly within the knowledge of the opposing party? Only the police surgeon and the analyst can know and say whether the instruments and receptacles used have been sterilized or otherwise made free of contamination, and whether the foreign products did, or did not, affect the analysis.

(c) SENTENCE

The legislatures in the various provinces have been imposing ever-increasingly heavy penalties for the offence of driving under the influence of liquor, and in particular have empowered the courts to impose sentences of **imprisonment** of up to one year (section 140(2), Ord. 21 of 1966 (C)). There is, however, no principle in law that all persons so convicted should in every case be sentenced to imprisonment (*R. v. Abrahams*, 1948 (2) P.H., O. 26 (C)). In determining whether imprisonment is an appropriate punishment the five main elements to be considered are (a) the degree of intoxication, (b) the conduct of the driver on the occasion in question, i.e. whether he drove negligently or not (*R. v. Booysens*, 1949 (2) S.A. 109 (N); *R. v. Pistorius*, 1949 (2) P.H., O. 45 (N); *R. v. Hattingh*, 1952 (2) P.H., O. 10 (N); *R. v. Salkow*, 1949 (2) P.H., O. 36 (T)), i.e. the manner in which he drove, (c) the traffic conditions at the time, whether on an open road or a built-up area, (d) the previous record of the accused, his age and (e) whether damage was done as a result to other persons or their property (*S. v. Oshman*, 1962 (3) S.A. 643 (O); *S. v. Cooke*, 1968 (3) S.A. 159 (E); *S. v. Cox*, 1963 (4) S.A. 731 (E); *S. v. Lombard*, 1967 (3) S.A. 541 (N); *S. v. Sinclair*, 1963 (1) S.A. 558 (C), and *S. v. Essop*, 1963 (2) P.H., O. 41 (T)).

A distinction could also be drawn between the case of a man who drinks knowing that he is going to drive and a man who gives way to a sudden temptation to drive another's car in which the ignition keys have been left (*S. v. Russell*, 1968 (3) S.A. 273 (N)). The **suspension** of a driver's licence should also be taken into account in weighing up what sentence, by way of a fine or imprisonment, should be imposed (*ibid.* at 227, and *S. v. Voigt*, 1965 (2) S.A. 749 (N)). See also *S. v. Kelder*, 1967 (2) S.A. 644 (T). Where, therefore, the accused was only **mildly** under the influence of liquor and there was **no negligence** proved on his part the Court of Appeal suspended the sentence of imprisonment (*R. v. Ackhurst*, 1948 (2) S.A. 811 (C)), for 'every individual case should be closely examined and no general yardstick should be employed' (*R. v. Poezyn*, 1947 (2) S.A. 262 (C)). See also *R. v. Holloway*, 1946 C.P.D. 825. In *R. v. Pistorius*, 1949 (4) S.A. 947 (N), it was held that imprisonment is not an appropriate punishment unless the accused had been guilty of a reckless act which connotes a high degree of negligence. The conviction was also quashed in

R. v. Van Rhyn, 1955 (2) P.H., O. 9 (C), where the evidence of both the constable and the doctor was uncertain.

Volenti? Unless the intoxication of the driver is extreme, a passenger taking a lift from such driver is not debarred (on the basis of *volenti non fit injuria*) from claiming damages for injuries suffered due to the driver's negligent driving (*Dann v. Hamilton* [1939] 1 All E.R. 59 (K.B.)).

ROAD—PARKING PLACE

In Rhodesia, on the other hand, it was held that a parking place on private property, in terms of Cap. 289, must have been set aside for the use of members of the public and this means a properly marked parking place with notices and/or parking bays. Consequently to drive a motor vehicle whilst under the influence of intoxicating liquor in the grounds of a police hostel did not constitute an offence (*Scott-Crossley v. R.*, 1969 (2) P.H., H. (S) 84 (R.A.D.); and 1969 (4) S.A. 49 (R.A.D.) (see *ante*, p. 295).

5. FALLING ASLEEP WHILE DRIVING

This aspect of negligence is more often coupled with that of failing to keep a proper look-out, but it is clearly distinguishable from it in that, in the latter case, negligence is attributable to an inefficient attitude of the conscious mind, whereas in the former case it is due to a culpable state of unconsciousness. Cases of this nature usually occur in the early hours of the morning while the driver is returning home after an exhausting evening preceded, not infrequently, by a tiring day. See *Chatterton v. Parker* (1914) 78 J.P. 339. The inference is generally raised from the particular facts (*R. v. Whiley*, 1935 C.P.D. 466). See also *R. v. Girdlestone*, 1948 (4) S.A. 95 at 97–8. In England it has been considered that to fall asleep while driving constitutes the act of 'driving dangerously' and it is no defence for the driver to plead amnesia (*Hill v. Baxter* [1958] 1 All E.R. 193 (Q.B.) at 198). If, therefore drowsiness overtakes a driver he should stop and wait until he has recovered himself or is fully awake (*R. v. Shevill*, 1964 (4) S.A. 51 (R.A.D.) at 53).

Where an accident occurred at night, when there was no other traffic and the car, which was in good order, is shown to have gradually inclined to the right-hand side of the road before it left the tarmac and thereafter travelled parallel to the road before turning over, it was held that the proper conclusion to be drawn was that the driver had fallen asleep whilst driving (*Sauerman v. Barnard*, 1958 (4) S.A. 149 (C)).

6. PHYSICAL DISABILITY

Instances are not rare where a driver is labouring under, or has suddenly been overcome by, some physical disability, which altogether deprives him of the power of control of his vehicle. Whether he is, for that reason, to be held responsible for the injurious consequences that ensue would depend largely, if not altogether, upon a finding as to whether he could, and should, have **foreseen** the incidence of this disability. A person suddenly and unexpectedly overcome by a fainting fit would not, on that account, be held liable for damage caused to another (*R. v. Whiley* (*supra*),

and *R. v. Schoonwinkel*, 1953 (3) S.A. 136 (C)). The position would, however, be otherwise if the driver knows, or ought to have known, that he is liable to be overcome by some attack which would deprive him of the power of adequately controlling his automobile. The same considerations would apply where a party undertakes to drive an automobile knowing that his **hearing** or his **sight** is inadequate for him to meet the needs and emergencies of a driver upon the highways. In *R. v. Victor*, 1943 T.P.D. 77, it was decided that it was negligence for a person, who knew he was subject to **epileptic fits**, to assume responsibility of a car upon a public highway. If, however, the nature of the epilepsy from which the driver is suffering is such that he would normally not have realized the dangerous consequences of driving a motor vehicle (he having had only two previous minor attacks—the last a considerable time before the collision), he can hardly be convicted of negligent driving (*R. v. Schoonwinkel*, 1953 (3) S.A. 136 (C)). See also *Hill v. Baxter* [1958] 1 All E.R. 193 (Q.B.) at 198. Similarly, a person who is deprived of the use of **one hand** undertakes a great risk in taking a motor vehicle out where he is liable to have to change gears in a busy street during the course of his journey (see *Gaffney v. Dublin U.T. Co.* [1916] 2 Ir. R. 472, and *Smith v. Browne*, 28 L.R. Ir. 1). This applies also to a person with a well-known defect in his leg (*R. v. Verster*, 1952 (2) S.A. 231 (A.D.)). Where there is no apparent reason, other than the carelessness of the driver, to account for the accident, the State is not obliged to go further and negate the suggestion that the damage complained of was due to some physical disability, such as a faint, on the part of the accused which deprived him of the power of control (*R. v. Whiley*, 1935 C.P.D. 466). (In this regard it should be noted that a conviction for reckless driving on the ground of defective eyesight or other physical infirmity does not entitle the court to cancel the accused's driving licence (*R. v. Lowe* (1938) *S.A.L.J.* 220, *sed quaere*).)

LEGISLATION

The various provincial Ordinances now make provision for the licensing of a person suffering from a physical defect, provided the particular vehicle which he proposes to drive has been specially adapted, altered or constructed to meet his peculiar defect to the extent of enabling him to drive without endangering public safety.

The question of physical disability is also discussed in (1947) *S.A.L.J.* 361–73.

7. KEEPING A PROPER LOOK-OUT

(a) INFERENCE FROM FACTS

The problem as to whether the defendant has been keeping a proper look-out at the time in question arises in almost every collision trial, and must be determined by the facts of each individual case. The conclusion is usually justified by inferences which have been drawn from the circumstances of the particular case, since the presumption is that no person will, of set purpose, deliberately run another down or collide with another vehicle or person (see *R. v. Rampersad*, 1947 P.H., O. 7 (N); *R. v. Girdlestone*, 1948 (4) S.A. 95 (S.R.)). (See *Res Ipsa Loquitur*, *post*, p. 496.) From

the subjective point of view, failure to keep a proper look-out is attributable to a variety of causes. It may be due to **tiredness** (*R. v. Whiley (supra)*) or it may be due to a **preoccupation** on the part of the driver. In *Whiley's* case the accused had run into and killed a pedestrian at 3 a.m. and the Court held that, as the accused was tired and sleepy, the inference that he was not keeping a proper look-out was almost irresistible (cf. *Olivier v. Botha*, 1960 (1) S.A. 678 (O) at 681). This is so when the driver drives in circumstances in which it is impossible for him to keep a proper look-out (*R. v. Van Rensburg*, 1949 (3) S.A. 207 (T)).

Inferences: In general, proof of a failure to keep a proper look-out is provided by evidence to the effect that, at the time and place concerned, a pedestrian or object was, in fact, clearly visible to other road-users. Once this is established an inference may be drawn that the defendant, or accused, could not have been keeping a proper look-out since, if he had, a reasonably careful person should have seen the person or object referred to (*S. v. Botha*, 1962 (2) S.A. 443 (T)). When, therefore, it is proved that the defendant has collided with a person or thing, which any reasonable man **ought** to have observed had he been looking about him properly, the court will usually, in the absence of any explanation from him, consider itself justified in drawing the inference that he was not keeping a proper look-out (*Kuranda v. Sinclair*, 1932 W.L.D. 1; *Davies v. Union Govt.*, 1936 T.P.D. 197, and *R. v. Southwark*, 1948 P.H., O. 3 (S.R.); *London Passenger Transport Board v. Upson* [1949] 1 All E.R. 60 (H.L.) at 63, and see *post*, p. 308). Nor will any indulgence be granted him in his defence in saying that, when he eventually did see the plaintiff, it was then too late to avoid the collision (*Sutherland v. Banwell*, 1938 A.D. 476). Consequently, where the driver of a motor vehicle should, by keeping a proper look-out, have foreseen that at a particular spot on the road there would be a jam if he proceeded as he was doing, and, in order to avoid an oncoming vehicle he swerved and so killed a pedestrian, the Court ruled that he was guilty of culpable homicide, since he had not been confronted with any sudden emergency (*R. v. Rampersad*, 1947 P.H., O. 7 (N)). If this inference is sufficiently strong a conviction for culpable homicide may be justified (*R. v. Koen*, 1937 A.D. 211). In this case the accused, in a well-lit street, was endeavouring to pass his friends in another car ahead of him, and in so doing struck the deceased, carrying the latter for some 25 yards. Here the Court held that, in the absence of some reasonable explanation from the accused, the *prima facie* proof became complete proof of the accused's guilt (see *post*, pp. 308).

Where a driver stated that her visibility was 50 feet but that she saw the plaintiff when he was only 25 feet away, the Court felt itself justified in concluding that she was not keeping a proper look-out (*Heneke v. Royal Insurance Co.*, 1954 (4) S.A. 606 (A.D.)).

Distractions: Implicit in the duty to keep a proper look-out is the obligation to avoid one's attention being distracted by other untoward incidents or circumstances which might reasonably have been foreseen and guarded against, but, axiomatically, not against sudden emergencies. (See *S. v. Smit*, 1963 (4) S.A. 824 (G.W.); *S. v. Lombard*, 1964 (4) S.A. 346 (T), and *S. v. Mayne*, 1964 (1) P.H., O. 17 (O), detailed and discussed *ante*, p. 294.)

(b) MEANING OF PROPER LOOK-OUT

A proper look-out means more than looking straight ahead—it means a consciousness of what is happening in one's immediate vicinity, and this includes a watchfulness by **hearing** as well as by sight (*Frodsham v. Aetna Insurance Co.*, 1959 (2) S.A. 27 (A.D.)). *R. v. Van den Berg*, 1940 P.H., O. 25 (O), per Van den Heever J.:

'Uitkyk beteken nie net vlak voor jou kyk nie; uitkyk beteken van alles bewus wees wat in jou omgewing gebeur; dit bedoel vooruit sien dat daar rytuie van voor aan nader is wat 'n gevaar kan daarstel en so vroegtydig uitkyk dat jy nie die insittendes in gevaar bring nie.'

A driver who fixes his attention upon objects outside the road without, at the same time, being aware of what is going on in the road in front of him, is certainly not keeping a proper look-out (*Beswick v. Crewes*, 1965 (2) S.A. 690 (A.D.) at 701). On the other hand when one is driving along a road **at night** one's attention is not unnaturally focused upon the road being travelled upon, and therefore a failure to see something that might be just within the range of one's lamp lights to the right or left can hardly be attributed to negligence (*Klaas v. Serfontein*, 1940 C.P.D. at 621). See also *R. v. Lessing*, 1942 G.W.L. 109, where the accused saw cattle suddenly emerging out of the darkness on his left side about 60 feet away, and where his plea, that it was then too late to stop, was accepted.

(c) DELEGATION OF DUTY

The duty to keep a proper look-out is apparently one which may, on appropriate occasions, be delegated by the driver of a car to another person. Thus, where a driver, in reversing his car into a backyard, had a person outside the car and behind him giving the signal to come in and directing him when he should stop, the Court found that the said driver was not answerable for the death of a person who had become crushed between the reversing lorry and another vehicle standing there (*R. v. Breytenbach*, 1943 C.P.D. 233).

This power, however, of delegating a responsibility which rests primarily on the shoulders of the driver, is one which will not lightly be conceded. Thus, in *Shleifman v. Levin and another*, 1961 (3) S.A. 277 (C), it was decided that a motorist who, when desirous of crossing a road whereon his view was blocked by a packed furniture van, had relied upon a sign or signal given to him by another motorist, could not escape responsibility by relying upon the eyes of someone else. See also *Fourie v. Coetzee*, 1947 (2) S.A. 646 (S.W.A.), where the defendant's driver had two Natives seated at the back of his lorry to warn oncoming traffic to stop at a distance from the lorry as it was running backward down a hill, which it had failed to negotiate owing to defective brakes, the Court ruled that he was not to be exonerated from blame for damage caused to plaintiff with whose motor cycle the lorry collided in its progress. The guiding principle inherent in *Shleifman's* and *Fourie's* cases (*supra*) would appear to be based on the principles of agency, *qui facit per alium facit per se*, so that, to rely upon the directions of an *ad hoc* negligent agent, is no ground for excluding the driver's liability when sued for damages by another and innocent road-user.

(d) RELATION TO SPEED

The adequacy of a look-out is not unnaturally related to the speed at which one is travelling, for the greater the speed, the greater is the degree of concentration required, or, as was said in *R. v. Apter*, 1941 O.P.D. 161, 'the greater the pace, the greater is the need for watching the road ahead'. Indeed, so intimately are the two features often interrelated that they are often relied upon as an alternative to one another in seeking to bring home the responsibility for a collision upon a particular defendant. In such cases the inference will usually be that he was either travelling too fast or that he was not keeping a proper look-out. Thus, in *Thornton v. Fisser*, 1928 A.D. 398, where the defendant had, on a rainy night when visibility was bad, knocked down the plaintiff, who was standing on the 'safety zone', the Court held that it was his duty so to regulate his speed that he would be able to draw up within the range of his visibility. Similar considerations were applied in the case of *Ramatlo v. Kurland*, 1930 T.P.D. 435. In this case the facts were that on a dark night the plaintiff, having dimmed his lights for an oncoming car, found, on putting on his headlights again, that he was within 4 yards of a wagon which was carrying no lights. A collision occurred, and, in the ensuing action, the Court held that the plaintiff was guilty of contributory negligence in that, once having dipped his lights, he ought to have slackened speed so as to be able to draw up within the range of his visibility. He was therefore either travelling too fast for the range of vision which his lights gave him, or he was not keeping a proper look-out. See also *R. v. Botha*, 1937 P.H., O. 1 (N) (*post*, p. 397); *Blaiberg v. Kleynhans*, 1938 C.P.D. 305, and *R. v. Potgieter*, 1938 N.P.D. 272.

The **dilemma of the driver**—as indicated by the above-mentioned cases—has in recent years been applied only with great reluctance, particularly where the accident takes place **at night**. Thus in *Hodgkiss v. Murray*, 1948 (3) S.A. 266 (E), it was held that the failure to see an unlighted wagon at the very moment of being dazzled by the lights of an oncoming car was not in itself negligence. See also *S. v. Jakhals*, 1961 (4) S.A. 573 (C). (For a fuller treatment of this matter see *post*, p. 394.)

(e) TURNING HEAD TO SPEAK TO PASSENGER

Under the heading of keeping a proper look-out arises the question as to whether the driver of an automobile is negligent merely because he turns his head to talk to a fellow passenger. In *R. v. Havenga*, 1935 C.P.D. (J/C 568/35), Gane J. said:

'The worst point that is made against the accused is in the evidence of Jackson that he was looking towards, and talking to, his fellow passenger. But an expert motorist, such as this man was, could quite easily carry on a conversation, and even occasionally look at his passenger, without necessarily being negligent.'

The same view was taken in *Job v. Reynolds*, 1930 E.D.L. 246, the facts of which were that the complainant overtook and passed a bus and then crossed its path, conceding the bus-driver only $1\frac{1}{2}$ seconds in which to avoid a collision. It was alleged that shortly before the accident the bus-driver had turned his head to speak to the bus-conductor. The Court, on appeal, held that proof that the bus-driver (the accused) had turned his

head was not affirmative proof of negligence. Per Nathan J., quoting Earle C.J. in *Cotton v. Wood* (1860) 8 C.B.N.S. 571:

'One of plaintiff's witnesses stated that the driver was looking round at the time to speak to the conductor. That alone clearly would be no affirmative proof of negligence. The man driving was on his proper side and I do not find it imputed to him that he was driving at an improper pace.'

In that case, as in this, the looking round on the part of the driver was a **momentary act**. It follows as a consequence that where the looking round amounts to more than a mere 'momentary act', then the driver can hardly be said to be driving with due care and attention to other traffic. *Cooper v. Armstrong*, 1939 O.P.D. 140, and *Roos v. Fischer*, 1939 O.P.D. 122, are examples of cases where the Court found that the proximate cause of a collision at an intersection was the fact that the driver had centred her eyes and attention on her passenger. See also *R. v. De Kock*, 1918 E.D.L. at 223.

It is submitted, therefore, that whether an act of turning one's head to speak to a fellow passenger would constitute negligence or not depends, almost entirely, upon the state of the traffic on the road—or likely to be on the road—at the time in question. In a very **busy** thoroughfare, where the maximum of concentration and attention is required, even a momentary diversion of one's attention from the traffic, for the purpose of looking at one's companion, may well be reprobated as culpable.

(f) PROOF

Before a finding for failing to keep a proper look-out can ensue it is necessary to prove clearly that the circumstances, such as the lighting, visibility, etc., were such that a reasonable man **ought to have observed** and avoided the object which, or person with whom, the accused or the defendant is alleged to have collided (*R. v. Yssel*, 1945 T.P.D. 236; *R. v. Patterson*, 1946 P.H., O. 36 (T); *R. v. Rosenthal*, 1948 (1) S.A. 51 (N)). Such proof may be effected by evidence of some person making a test at a later date at the same **time** and under as nearly as possible **identical conditions**; unless, of course, the evidence of eyewitnesses at the time is sufficient to dispose of this difficulty (cf. *R. v. Du Plooy*, 1947 (1) A.S.A.R. 512, and *R. v. Kroukamp*, 1927 T.P.D. 412) (see *post*, pp. 394 and 395–6). Thus in *East London Municipality v. Van Zyl*, 1959 (2) S.A. 514 (E), it was found that a man, clothed in a dark suit and crouching down in a street, could not necessarily have been seen by the defendant.

In regard to tests, one should bear in mind the danger of being wise after the event; a note of caution which was sounded by Davis J. in *Klaas v. Serfontein*, 1940 C.P.D. 616, when he held that tests, as to how far off one can see a stationary object immediately alongside the road at night, are often of little value:

'... In any case when one is making a test, one's mind, and consequently one's eyes, are directed to looking to see whether anything is or is not in a particular area; whereas when one is driving along a road *at night* one's attention is not unnaturally focused upon the road being travelled upon, and a failure to see something that might just be within the range of one's lamps to the right or left can hardly be attributed to negligence.'

On the other hand, although the onus rests on the State to prove adequate visibility, it is not necessary for the State to direct specific evidence to eliminate possibilities of invisibility which have never been suggested by the accused. If the evidence establishes that a motor-car, bearing no lights, is standing in an open road, an inference or *prima facie* case arises that such an opaque object was visible to all wayfarers and should have been observed by the driver in question if his own car had been equipped with lights of normal strength (*R. v. Malan*, 1946 T.P.D. 642). The particular surrounding circumstances of the case, or the emergency of the occasion, may, however, be sufficient to rebut this presumption of fact (*Hodgson v. Hauptfleisch*, 1947 (2) S.A. 98). (See *post*, p. 395 and *S. v. Naik*, 1969 (2) S.A. 231 (N) (summarized *post*, p. 318).)

Cases

In the majority of cases a failure to keep a proper look-out is generally associated with some other aspect of negligence, and these are dealt with in other places, but a short résumé of the instances where the driver has been found **not** to have been maintaining a proper look-out may be summarized hereunder:

Where defendant's car struck another in an intersection (*Victoria Falls Power Co. v. Thornton's Cartage Co.*, 1931 T.P.D. 516, and *Murray v. Britz*, 1933 N.P.D. 352).

Where, in passing a tramcar, the accused knocked over a passenger alighting therefrom (*R. v. Marais*, 1932 P.H., O. 42 (C)).

Where the driver of a car, in endeavouring to pass a car ahead of him, had knocked down a pedestrian in the middle of the street (*Fallon's Estate v. Claret*, 1932 A.D. 177; *Wagenaar v. Thomas*, 1930 W.L.D. 81; *R. v. Ekermans*, 1935 C.P.D. 32). In each of these cases it seems that the defendant, in paying attention to the car he was about to pass, failed to observe the pedestrians who were on the road at the time.

Where the driver, in desiring to turn to his right, had merely hooted, put his hand out and turned, without observing the approach of an oncoming vehicle (*Sampson v. Pim*, 1918 A.D. 657).

Where the defendant had pulled off into the stream of traffic without looking behind him to see the complainant's approach (*Barendse v. Smith*, 1923 E.D.L. 269).

Where the defendant had approached a level-crossing with his side flaps up, thereby obscuring his view of a train with which he collided (*Wright v. Stuttaford & Co.*, 1929 E.D.L. 377). (But to drive with side-flaps up is probably not, in itself, a negligent act—see *Union Govt. v. De Beer*, 1936 A.D. 262, and *post*, p. 331).

Where the accused had stopped and then had later started his car again without observing that a little girl, playing in front of his car, had altered her position (*Gordon v. R.*, 1935 P.H., O. 21 (T)).

Where the accused was approaching a spot where the road forked off and collided with a cyclist approaching him down one of the forked roads (*R. v. Roup*, 1936 C.P.D. (J/C 773/36)).

Where the defendant had, on approaching the plaintiff, swerved off the road to his left and then, suddenly seeing a drain in his path, had swerved to his right thereby colliding with the complainant (*Lentz v. Elder*, 1929 E.D.L. 153). In this case the Court held that the defendant's failure to observe the drain before the moment when he suddenly tried to save himself, constituted negligence.

Where the accused had failed to see the signal to stop given to him by a person standing at the side of the road (*R. v. Sabaan*, 1931 E.D.L. 342).

Where the respondent admitted that he did not see appellant's car in the intersection until the moment of impact (*African Tobacco Manufacturers v. Inglis*, 1935 N.P.D. 66).

Where both parties entered an intersection without taking proper precautions to observe the approach of other vehicles, and had collided with one another, the Court

on appeal ruled that the correct judgment should have been one of absolution from the instance (*Franco v. Klug*, 1940 A.D. 126).

Where the plaintiff, at a pedestrian crossing, took such little notice of oncoming (trespassing) traffic that he ran into the back portion of a car as it passed in front of him. Held, that though neither party had seen the other, judgment should be for defendant with costs (*Pincus v. Solomon*, 1942 W.L.D. 243).

Where the driver failed to see a car pulling out slowly from a line of parked cars (*R. v. Wolff*, T.P.D. 26.4.1937 (unreported)).

Where a motorist, in broad daylight, knocks down a pedestrian who is walking in the same direction (*R. v. Beck*, 1937 P.H., O. 25, and *R. v. Venter*, 1932 O.P.D. 147).

Where the driver, on approaching an intersection, pressed his hooter and, finding that it failed to work, looked down to see what was wrong. On the completion of his examination he looked up and saw the plaintiff two yards away (*Styger v. Blignaut*, 1932 P.H., O. 27 (O)).

Where plaintiff drove into the defendant's car parked by the side of the road on a foggy night (*Matthews v. Schechter*, 1925 C.P.D. 183). The same conclusion was arrived at when a similar occurrence took place on an ordinary night (*Salmon v. Vermooten*, 1940 T.P.D. (J/C 154/40)).

Where it is established clearly that the plaintiff had put out his hand before making a turn the inference is that the defendant was not keeping a proper look-out if he acts as if he had not been aware of the plaintiff's intentions (*Makasi v. Barnard*, 1941 C.P.D. (J/C 268/41)).

In the following cases the court **declined** to hold that the driver concerned had **failed to keep a proper look-out**:

Where a bus-driver, travelling about 6 to 8 m.p.h., on crossing an intersection was suddenly confronted with the deceased in an intoxicated condition, who had, without warning, lurched off the pavement into the way of the oncoming bus (*R. v. Du Plessis*, 1936 A.D. 124).

Where a collision occurred with a railway trailer which, owing to its structure (a horizontal body with no containing sides, and supported on axles and wheels), presented an object of exceptional invisibility (*S.A.R. v. Estate Saunders*, 1931 A.D. 276).

Where the driver of a motor cycle was unexpectedly and suddenly caught in a whirlwind of dust coming down a side street and ran into two persons wearing dark clothes, who were standing in the shadow of the street, the accused having slowed down as soon as the whirlwind had struck him (*R. v. Short*, 1927 C.P.D. 146).

Where the driver had, at night-time, when overtaking another car, run over a person lying prostrate in the road in an intoxicated condition (*R. v. Abrahamson*, 1938 T.P.D. (J/C 227/38)).

Where a driver, before turning, looked into his mirror but failed to see an overtaking cyclist, there being no evidence to establish that the overtaking cyclist was in such a position that he ought to have been seen by the driver (*R. v. Van der Merwe*, 1939 P.H., O. 57 (E)).

Where a driver collided with sheep which were practically invisible on the road until he was two seconds distant from them (*Cromhout & Dewing v. Green*, 1942 E.D.L. 238, and *R. v. Beauchamp*, 1942 E.D.L. 227).

The driver of a car **reversing** slowly along a highway who does not see a motor cyclist approaching him from the rear, may be guilty of negligence in the abstract which does not in any way contribute to the accident resultant upon the cyclist's collision with the car (*Von Buren v. Minister of Defence*, 1947 P.H., O. 22 (N)).

Where a driver parked his car on a patch of green grass and, returning about ten minutes later, having approached from the back, had entered his car, moved off and driven over a Native who was found to have been lying in front of the car but so close to it that it was impossible for him to be seen from the driver's seat (*R. v. Lazar*, 1944 P.H., O. 18 (T)). Compare *R. v. Gordon*, 1935 P.H., O. 21 (T) (*post*, p. 423), which is easily distinguishable by reason of the fact that the little girl was in close vicinity to the car when the accused drew up and he was therefore aware of her presence.

Where plaintiff had approached defendant on an unlighted bicycle at night and was not seen by the latter until he was 20 yards away, the cyclist not being a very visible object (*Klaassen v. Benjamin*, 1941 T.P.D. 80, and *R. v. Govender*, 1947 P.H., O. 21 (N)).

Where a driver reversed down a ramp at a garage and struck a pedestrian walking down it (*Frodsham v. Aetna Insurance Co.*, 1959 (2) S.A. 275 (A.D.)).

8. BLINDED BY HEADLIGHTS OR SUN

Ordinarily it might seem that the fact of having been blinded by the rays of the sun or dazzled by the lights of an oncoming car would provide an excellent excuse for a collision resulting as a consequence, but the courts have been loath to accept such plea save in very exceptional circumstances and only when it appears that there has been no negligence both before and after having been so blinded. Primarily it is the duty of the driver, so affected, immediately to slow down, for **if he is unable to see where he is going he is manifestly not entitled to go there** (*Kruger v. Ludick*, 1947 (3) S.A. 23 (A.D.); *R. v. Valpy*, 1937 P.H., O. 26 (C); *R. v. Wadley*, 1937 P.H., O. 27 (C); *R. v. Stephenson*, 1928 C.P.D. 114; *R. v. Gishion*, 1948 (2) S.A. 131 (T); *R. v. Peach*, 1948 (2) S.A. 29 (E)), and this is a duty owed both to himself and to others (*R. v. Williams*, 1935 E.D.L. (J/C 723/35)). It follows that the driver, on seeing a car approaching him at night-time, ought to **anticipate** that he might be blinded by its headlights and he should therefore get on to his left-hand side of the road, apply his brakes and diminish his speed (*R. v. Van den Berg*, 1940 P.H., O. 25 (O); *R. v. Cowan*, 1948 (1) S.A. 59 (N), *R. v. Peach* (*supra*); *S. v. Van Deventer*, 1963 (2) S.A. 475 (A.D.) at 481-2), since the mere fact that the motorist is temporarily blinded by the lights of an oncoming car does not constitute a defence to a charge of culpable homicide in respect of a pedestrian whom the accused had not seen, if the accused had warning of the danger, due to the dazzling lights, in time to stop and avoid the collision (*R. v. Kolbe*, 1942 O.P.D. 114). In *Cowan's* case (*supra*) it was found that the accused's blindness was neither temporary nor unexpected, and the conviction was accordingly confirmed.

There is, however, no rule of law or absolute duty to the effect that a driver must stop his vehicle immediately he is blinded by oncoming lights (*R. v. Wiedeman*, 1957 (1) P.H., O. 3 (G.W.), and *Brakpan Town Council v. Moore*, 1947 (3) S.A. 97 (T) at 101; *Olivier v. Botha*, 1960 (1) S.A. 678 (O) at 682-3). Each case must be dealt with according to its own particular circumstances.

The time factor is an important consideration in weighing the culpability of the driver of a vehicle who is blinded by the lights of an oncoming car, for if he is **suddenly** and **unexpectedly** dazzled and, before he has time to pull up or slow down, is involved in a collision with another vehicle or object (invisible to him because of being so temporarily blinded) he should not be held accountable and responsible for the damages sustained (see *Brakpan Town Council v. Moore*, 1947 (3) S.A. 97 (T), and *R. v. Botha and another*, 1960 (3) S.A. 386 (N)).

In the following cases, where the defendant was momentarily blinded and his vision obscured by the lights of an oncoming car, the Court ruled that he was not guilty of negligence: *Hodgkiss v. Murray*, 1948 (3) S.A. 266; *Manderson v. Century Insurance Co.*, 1951 (1) S.A. 533 (A.D.);

Brakpan Town Council v. Moore, 1947 (3) S.A. 97 (T); *Hodgson v. Hauptfleisch*, 1947 (2) S.A. 98; *R. v. Heydenrich*, 1942 T.P.D. 307; *Stewart v. Hancock* [1940] 2 All E.R. 427 (P.C.); and *R. v. Botha and another (supra)*.
See also *S. v. Naik*, 1969 (2) S.A. 231 (N), summarized *post*, p. 318.

Cases

Driver negligent

In the following instances the motorist concerned was held to have been blameworthy in continuing to drive on in the circumstances:

The plaintiff, on approaching a railway crossing, looked to see whether the line was clear but the sun in his eyes prevented him from seeing the train approaching, and, owing to the noiselessness of its approach, he could not hear it. A collision ensued and he instituted an action for damages, but the Court held that he was himself guilty of contributory negligence since, in electing to proceed in the circumstances, he was in no better position than if he could not see at all (*S.A.R. v. Hall*, 1929 T.P.D. 936). Per Tindall J.: 'Realising, as he must have done, that though he looked he did not see, he ought to have done two things. He ought either to have shaded his eyes until he did get a proper view or else he should have stopped and listened carefully.'

In deposing to the cause of an accident the defendant had relied on the fact that the sun in his eyes had obscured his vision and that that was the cause of the accident (*Sapford's Guardian v. Oberholzer*, 1933 O.P.D. 239). Per Krause J.: 'This evidence was not contradicted and in itself would establish defendant's negligence and responsibility.'

The accused was dazzled by the lights of an oncoming car as a consequence of which he struck a pedestrian whom he did not see until he was about 6 feet from him and it was then too late to pull up. Held, that the accused was in a dilemma; for, either the pedestrian was visible before the accused saw him in which case he was not keeping a proper look-out, or the pedestrian was not visible until accused was within 6 feet of him, in which case the accused was travelling too fast. In either case he was guilty of negligence and had been rightly convicted. Held, further, that this was not a case of a driver being suddenly and unexpectedly dazzled by oncoming lights, because the accused could have seen the approaching car from a considerable distance and it was apparent that the oncoming car had bright lights on (*R. v. St. Arnand*, 1933 P.H., O. 8 (C) (J/C 192/35), followed in *R. v. Cooper*, 1938 N.P.D. 172).

The accused had collided with a pedestrian standing in the safety zone and gave, as his reason for not seeing the latter, the fact that the lights of a motor-car were shining through the back of his window on to his mirror and momentarily blinded him. He stated further that he took his eyes off the road and looked towards the mirror in front and turned it to one side so as not to be blinded by the lights of the car behind. Just as he finished that and looked on the road again he saw the complainant within a few feet of his car. Per Watermeyer J.: 'I think the magistrate would have been justified in convicting the accused on his own evidence. Every motorist knows that the lights of a car from behind can blind one and he must take precautions. . . . The act of taking his eyes off the road and looking at the mirror was, I think, negligence on his part' (*R. v. Naude*, 1936 P.H., O. 25 (C) (J/C 558/36)).

The accused, in giving his reason for not seeing the deceased with whom he had collided, stated that, after passing a car, he found the car lights reflected on his windscreen. Per Lansdown J.: 'The defence offered is that the effect of this reflection upon the windscreen was to cause a certain amount of obscurity in front of the accused's car in which it would be impossible for the accused, however careful his look-out, to see the two pedestrians. If a motorist's visibility is in any way obscured by any fact, objective or otherwise, it is his duty to slow down or stop according to the circumstances, and if he takes a risk and injures or kills someone through not having adopted this necessary precaution, he cannot be absolved from criminal responsibility (*R. v. Freeman*, 1931 N.P.D. 460).

Where the accused was travelling at night-time at 60 m.p.h. with his lights dimmed and ran over a motor cyclist travelling in the same direction, the Court of Appeal held

that, in such circumstances, the conduct of the accused amounted to gross negligence, and refused to disturb the conviction for culpable homicide and sentence of eight months' imprisonment (*R. v. Celsi*, 1939 T.P.D. 475).

Driver not negligent

In the following cases the circumstances, wherein a party had been blinded by lights, were considered to provide a sufficient excuse to exempt the defendant from liability:

Where, before the accident, the accused was driving at about 20 m.p.h., and had then struck the complainant, who was walking at the side of the road in the same direction, and it appeared that the headlights of an approaching car from the opposite direction had blinded the accused. The accused thereupon dimmed his own lights and applied his brakes, but, **while slowing down**, had struck the complainant (*R. v. Hammer*, 1926 C.P.D. 87).

Defendant was proceeding with lights dipped along a main suburban road approaching an oncoming bus, when another car, proceeding in the same direction as the bus, emerged from behind it with headlights on and defendant was forced to swerve to his left, but in so doing ran into plaintiff's **unlighted parked car** on the left-hand side of the road. Held, that defendant was not liable in damages (*Hodgson v. Hauptfleisch*, 1947 (2) S.A. 98).

Where the accused had been travelling some 6 feet from the pavement of a road, which was 36 feet wide, and was **suddenly confronted** with a car coming round a bend towards him with its headlights full on, causing him to be dazzled for about a second. He instantly took his foot off the accelerator and put it on his brake pedal, intending to apply his brakes if the lights continued to trouble him. As he performed this manoeuvre he heard a scream, swerved to his right, felt a bump and pulled up. It appeared that the pedestrian had been struck almost immediately after leaving the pavement on the left-hand side of the road where there was a row of dense foliage which would make it abnormally difficult on that side of the street to see what was in front of him. In these circumstances the Court held that the appeal, against a conviction of the accused, should be allowed, since this was a case where the accused had collided with a pedestrian who had suddenly stepped into his path in such a way that there was nothing to make the motorist see him before the blinding took place (*R. v. Tickton*, 1936 P.H., O. 34 (T)). See also *Shearer v. Durban Corporation*, 1904 N.L.R. 192.

A driver is not bound, in all cases, immediately to stop for, if he is on his incorrect side of the road at the time of meeting dazzling headlights, it is his overriding duty to swing over to his left as quickly as possible (*Du Plessis v. Van Wyk*, 1947 (1) S.A. 294 (C)).

Respondent, when driving his car at night on a country road, found his eyes dazzled by the lights of an oncoming car. He reduced his speed and veered to his left. As he did so he observed an unlighted wagon about 8 to 10 yards off, but too late to avoid a collision. His lights were of sufficient strength to show an object at 30 to 40 yards. Held that it could not be said that he should have anticipated that he would have been dazzled at the very moment when the unlighted wagon was about to come into his range of vision (*Hodgkiss v. Murray*, 1948 (3) S.A. 266 (E)).

In this case the defendant, whilst driving a motor-car upon a road about 24 feet wide and at about 20 m.p.h., saw a motor-lorry driven by the plaintiff approaching slightly on the wrong side of the road at a distance of some 40 to 50 yards off and at a speed of approximately 25 m.p.h. Thereupon the defendant swerved to his wrong side of the road where the vehicles collided. It appeared that, even if the plaintiff had continued in a straight course without directing his lorry to his correct side of the road (as in fact he did when the vehicles were some 30 yards apart) the defendant would still have had some 11 feet of negotiable surface of the actual roadway. The Court held that the defendant was never in such a position of imminent danger as to excuse his wrongful act in swerving across to his wrong side of the road, and that it was such an act on the part of the defendant which was the proximate cause of the accident and that the plaintiff was entitled to damages.

Where the appellant driver whilst negotiating a bend in the road had not been able to see a pedestrian, as the bend had caused the latter to be outside the focus of her headlights, and where she had, thereafter, suddenly been blinded by the headlights of an oncoming car—when she had no reason to suppose that she would be so blinded—and had immediately applied her brakes upon being so blinded, it was ruled that she had not been negligent (*R. v. Botha*, 1960 (3) S.A. 386 (N)).

See also *Roux v. Taylor*, 1936 P.H., O. 10 (T).

Rules

From the aforementioned decisions it is possible to elicit the following principles which have been relied upon as a guide in the consideration as to whether there has, or has not, been *culpa* on the part of the party in control of the vehicle concerned:

1. When one is blinded or dazzled one should immediately **slow down** and keep to the **left of the road**.
2. For a collision resulting immediately upon being **unexpectedly** blinded, no responsibility would, in general, ensue.
3. But if one is aware of the approach of dazzling headlights one should **be prepared** for the contingency of being blinded and unable to see.
4. Any **unnecessary** continuance along a road, after being so dazzled and unable to see where one is going, is *culpa*.
To which two riders may be added:

- (a) Often the approaching driver is unaware of the fact that his lights have a blinding effect. Courtesy and good sense therefore demand that he dips or dims his lights upon being requested to do so by the other party's signalling such fact in the usual manner of alternatively dimming his own headlights and then turning them on to full glare again in rapid succession. (Failure to do so is now made a criminal offence for driving without due care and consideration for other road-users.)
- (b) Much of the effect of the dazzle can be avoided by the driver's concentrating his eyes on the left-hand side of the road, in the case of oncoming headlights, or, in the case of the sun's rays, by the appropriate use of the car's sun-shield.

See also 'Dimming' *post*, p. 330.

9. SUDDEN EMERGENCY

The rule regarding sudden emergency may be expressed in the following terms: 'A person who, by reason of another's want of care, or some unforeseen external contingency, finds himself in a position of imminent danger, cannot be guilty of negligence merely because in that emergency he does not act in the best way to avoid that danger' (*Thornton v. Fisser*, 1928 A.D. 398 at 412; *Morley v. Wicks*, 1925 W.L.D. 13; *Gains Golden Grain Bakeries v. Gouws*, 1929 T.P.D. 137; *Nel v. Pitt*, 1925 T.P.D. 178; *Cooper v. Armstrong*, 1939 O.P.D. 140; *Jackson v. Morris Taxi Service Co.*, 1943 N.P.D. 296; *Roos v. Fischer*, 1939 O.P.D. 122; and *Bonthuys v. Visagie*, 1931 C.P.D. 75; *Stolzenberg v. Lurie*, 1959 (2) S.A. 67 (W) at 74; *S. v. Mkwanzai*,

1967 (2) S.A. 593 (N) at 597; *Rankisson and Son v. Springfield Omnibus Services (Pty.) Ltd.*, 1964 (1) S.A. 609 (D)).

Per curiam in *S.A.N.T.A.M. v. Moolman*, 1952 P.H., O. 16 (A.D.):

‘Die vraag of S vir M moes gesien het indien hy behoorlik gekyk het is van geen belang nie; iemand wat probeer om ’n dreigende botsing te ontduik kan nie juis kieskeurig wees nie aangesien van die rigting wat hy inslaan.’

LIMITATIONS OF THE RULE

To this rule one finds four qualifications or limitations:

(a) The first is that, in order to avail himself of the benefit of the rule, the party concerned must have acted when **actually in a position of acute danger** (*Bonthuys v. Visagie*, 1931 C.P.D. 75).

(b) The second limitation is that, in order to avail himself of the benefit of the rule, **the party concerned must not himself have been responsible for being placed in jeopardy** (*Boughey v. Bredell*, 1904 T.S. 394; *Lentz v. Elder*, 1929 E.D.L. 153; *Beswick v. Crewes*, 1965 (2) S.A. 690 (A.D.) at 699; and *Stolzenberg's case (supra)*). In other words, a person who, by his own negligence, creates an emergency cannot claim the benefit of the rule which says that in cases of emergency a person should not be held responsible if, of two courses, he adopts the one which afterwards turns out not to be the better one (*Safford's Guardian v. Oberholzer*, 1933 O.P.D. 239; *R. v. De Villiers*, 1938 P.H., O. 23 (S.R.); *Jackson v. Nicolaai*, 1943 C.P.D. 227; *Pienaar v. Norbye*, 1939 C.P.D. 293; *McLaughlan v. Barnes*, 1954 (4) S.A. 503 (S.R.)).

(c) The third qualification to the rule is that the doctrine of sudden emergency **applies only when the plaintiff's conduct has been prima facie negligent** (*Van Staden v. Stocks*, 1936 A.D. 18). *Per De Villiers J.A.*:

‘It is, however, unnecessary to discuss these authorities or the extent of their application in our law, for obviously the doctrine of sudden emergency only applies in a case where the plaintiff's conduct has prima facie been negligent. In such a case the doctrine of sudden emergency is applied in order to excuse or negative the apparent negligence. It is clear from the dictum of Lord Blackburn, which counsel has himself quoted: “I agree that a man may not do the right thing, nay may even do the wrong thing, and yet not be guilty of neglect of his duty . . . and I agree that when a man is suddenly and without warning thrown into a critical position, due allowance should be made for this, but not too much (*Stoomvaart v. Maatschappij Nederland case*, 5 A.C. 891).”’

This dictum has, however, been rather too narrowly stated, since it applies only where a party to an action has been negligent: It also applies to cases when the emergency has been created by the action of a third party or by an act of God (*Brown v. Hunt*, 1953 (2) S.A. 540 (A.D.) at 545).

The mere fact that if the plaintiff had been more careful the damage would not have occurred is not sufficient per se to prove that he was also guilty of negligence (*Fred Saber (Pty.) Ltd. v. Franks*, 1949 (1) S.A. 388 (A.D.)). Similarly in *S.A.N.T.A.M. v. Moolman*, 1952 P.H., O. 16 (A.D.), it was held that whether a person, who swerves to avoid a collision, should have seen a third party standing in his new course had he kept a proper look-out, is irrelevant in determining whether he was contributorily negligent (see also *Fortman v. S.A.R. & H.*, 1948 (3) S.A. 595 (N)).

(d) The fourth qualification to the rule is that the **conduct of the plaintiff or the defendant setting up the defence of sudden emergency must not**, in the circumstances, **have been quite unreasonable**, for the principle that a person in the anxiety or agony of the moment is not expected to act with the same judgment and skill as in normal circumstances, must not be extended to excuse conduct which, even in a critical situation, is not reasonable (*Van Staden v. May*, 1940 W.L.D. 198; *Brown v. Hunt (supra)*). In other words, it is not every error of judgment which is excusable as not amounting to negligence, but only one which a reasonably careful and skilled driver might commit (*R. v. Du Toit*, 1947 (3) S.A. 141 (A.D.)). Where, therefore, the accused should have seen the other car approaching an intersection earlier than he did, it was decided that he should not be permitted to shelter behind the plea that the driver of that other car had placed him in a position of emergency (*R. v. Cawood*, 1944 G.W.L. 50).

The court should not, therefore, be prone to take an armchair, or hind sight view of the situation and must endeavour to place itself in the position of the defendant at the time when he would be acting in the agony of the moment (*R. v. Hele*, 1947 (1) S.A. 272 (E) at 276) for as was said by Innes J.A. in *Union Government v. Burr*, 1914 A.D. 273 at 286:

'Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstances of their position.'

See, also, *Stolzenberg v. Lurie*, 1959 (2) S.A. 67 (W).

In this regard it has been held that the driver of a **public vehicle** owes a duty to his passengers in an emergency to exhibit those qualities of skill, coolness and courage which a man in his position may reasonably be expected to possess (*R. v. Msimango*, 1950 (2) S.A. 205 (N)). In this case the accused, when his engine caught fire, lost his head and jumped out of the driver's seat with the result that the bus ran backwards over a precipice killing three passengers. Held, it was his duty to place the safety of his passengers above his own safety and not to panic in an emergency. If he was not prepared to do that, he must not accept responsibility for the lives of other people. He had merely to engage the gears before he left the bus (the hand-brake was out of action), and this he did not do. His conviction for culpable homicide was accordingly confirmed.

The error that a party makes in an emergency and on the spur of the moment when he has not the time to meditate on which is exactly the better course to pursue is usually termed by the courts an 'error of judgment' (*Thornton v. Fisser (supra)* at 412; *Swart v. Albertyn*, 1935 C.P.D. 71; *Solomon and another v. Musset & Bright, Ltd.*, 1926 A.D. 427 at 435; *Minister of Defence v. African Guarantee and Indemnity Co., Ltd.*, 1943 A.D. 141 at 151; *Steenkamp v. Steyn*, 1914 A.D. 536 at 553; *Stewart v. Bresler*, 1951 (3) S.A. 942 at 951). Per Wessels C.J. in *S.A.R. v. Symington*, 1935 A.D. 37 at 45.

'*Culpa* is not to be imputed to a man merely because another person would have realized more promptly and acted more quickly. Where men have to make up their minds in a second or in a fraction of a second, one may think this course the better whilst another may prefer that. It is undoubtedly the duty of every person to avoid an accident, but if he acts reasonably even if by justifiable error of judgment, he does not choose the very best course to avoid the accident, as events afterwards show, he is not on that account to be held liable for *culpa*.'

The aptitude or training of the defendant (or his servant) is relevant in ascertaining whether he should have dealt adequately with the dangerous situation or not (*Brown v. Hunt*, 1953 (2) S.A. 540 (A.D.)). See, also, *Union Govt. v. Buur*, 1914 A.D. 273, and *ante*, p. 10.

Cases

The following are instances where the doctrine of sudden emergency has been applied:

Appellants, while waiting at night on the main road for a tram at a recognized stopping-place which was indicated by a red light (a 'safety zone'), were knocked down by a motor-car driven by the respondent. The appellants, as the Court found, had seen the car at a distance of about 200 yards coming straight towards them. There was no other traffic on the road at the time, and, taking it for granted that the driver of the car would see and avoid them, they remained standing in the road until the car was close to them. When they realized their danger they judged it would be safer for them to remain standing rather than move across the road, as they feared that the car might swerve at the same time. At the last moment, however, they did move, but too late to prevent their being injured. In these circumstances the Court held that, in acting as they did, they committed an error of judgment, but that this could not be relied upon by the respondent, who had himself placed them in that position of imminent danger (*Thornton v. Fisser*, 1928 A.D. 398).

The defendant, in turning from a main road into a side road, cut the corner sharply and met the plaintiff coming towards him. Both swerved to avoid a collision, the plaintiff to his right and the defendant to his left, and collided. Held, that the plaintiff was entitled to damages (*Morley v. Wicks*, 1925 W.L.D. 13; *Leppan v. Grahamstown Municipality*, 1930 E.D.L. 396; *Van Staden v. Stocks* (*supra*) and *Nel v. Pitt*, 1925 T.P.D. 178).

A car, travelling at night, suddenly came upon an unlighted lorry in the road and stopped suddenly and without warning, causing the accused's car, which was travelling closely behind that car, to swerve to his right to avoid a collision, thereby coming into contact with a cyclist on his correct side of the road in the opposite direction. Held, that the appeal of the accused against a conviction for negligent driving should be allowed (*R. v. Wallach*, 1934 T.P.D. 334) (*post*, p. 334). See, also, *R. v. Heydenrich*, 1942 T.P.D. 307.

Similarly, in a civil action it was ruled that the plaintiff, by travelling on an important road in a carriage without lights, had by his contributory negligence disentitled himself to damages (*Blaiberg v. Kleynhans*, 1938 C.P.D. 305). See, however, *Durban Corporation v. Milne*, 1939 N.P.D. 488, and *post*, p. 397.

Similarly, where the defendant had been travelling at an excessive speed and, in swerving to avoid an unlighted lorry, had collided with the plaintiff, the Court refused to concede to defence of sudden emergency (*Van Staden v. May*, 1940 W.L.D. at 201).

In *Brown v. Hunt*, 1953 (2) S.A. 540 (A.D.), a petrol-pump employee had allowed too much petrol to flow into a car which he was in the act of supplying with the result that some petrol was spilt on the road. The petrol, for some unexplained reason, caught alight, whereupon the employee took a hose and played water on to the flames in the direction of plaintiff's car with the result that his car caught alight and was destroyed. Held, that as the employee was engaged in an activity which required some aptitude or special training as to give him the ability to cope with dangerous situations of this character, it was not permissible for his employer to set up the defence of a sudden emergency.

The defendant when, about 40 yards off, hooted to warn the plaintiff, an elderly man, of his approach, but the plaintiff gave no indication of having heard it. Defendant continued and when about six paces from the plaintiff, hooted again. The latter, in his alarm, jumped backwards and was injured by the defendant's car. In the circumstances the Court held that the plaintiff was entitled to damages (*Katzenstein v. Duvenhage*, 1929 N.P.D. 294). Per Dove-Wilson C.J.: 'On defendant's own showing, if plaintiff jumped backwards, it was an instinctive effort on his part to avoid danger caused by the defen-

dant's negligence in driving his car in such extreme proximity to him and he cannot set up such a state of terror produced by his wrongful act, as a protection against the consequences.'

The plaintiff's car was approaching a rise in a country road on its correct side of the road and defendant was travelling on the wrong side in the opposite direction up the other side of the rise, the cars being invisible to each other. When they came into view of each other at the top of the rise they were about 10 yards apart and plaintiff thereupon swerved to his right to avoid a collision. Defendant, however, at the same time also swerved to his correct side of the road and a collision occurred. The Court held that since the defendant had created the emergency he was liable in damages (*Swart v. Albertyn*, 1935 C.P.D. 71). See, also, *Pienaar v. Norbye*, 1939 C.P.D. 293; *R. v. Zucker*, 1934 E.D.L. 269; where the facts were almost identical.

The position is the same where the parties are approaching each other round a bend in the road. If the party on the incorrect side of the road puts the other into a state of emergency he cannot complain that he, at the last moment, veered on to his correct side (*Laing v. Vermeulen*, 1943 C.P.D. (J/C 116/43)).

In *Lentz v. Elder*, 1929 E.D.L. 153, the defendant, on approaching a lorry, slowed down and drew off the road but failed to notice a drain in the way until close upon it, when, to save himself, he swerved sharply to his right and collided with the lorry. Their was room on the roadway for defendant to have passed the lorry. Held, that the defence of sudden emergency failed as, if there was an emergency, it was of the defendant's own making.

The unexpected failure of one's lights cannot constitute a valid defence on the ground of sudden emergency unless the driver at once applies his brakes and pulls up (*R. v. Pole*, 1941 T.P.D. 177).

Defendant's car struck a pot-hole, causing the spring in the steering apparatus to be broken. This locked the steering-wheel and caused the car to deviate to the right when he collided with the plaintiff. Held, that since he could have stopped twenty yards sooner than he did, he was liable in damages (*Lombard v. Van Eyssen*, 1941 C.P.D. (J/C 266/41)).

A motorist who is travelling after dark, uphill and towards a bend at a reasonable speed is confronted by a sudden emergency when a cyclist, not showing lights, swings downhill at a speed and despite a reasonable look-out by the motorist is not seen until he is about 15 yards away. If, in the emergency of the occasion, the motorist turns to the right-hand side of the road, he cannot be convicted of negligence (*R. v. Govinder*, 1947 P.H., O. 21 (N)).

In *S. v. Naik*, 1969 (2) S.A. 231 (N) a driver had, on approaching a curve on the road, observed the bright headlights of another vehicle on the road ahead of him and presumed that such lights were those of an approaching car and dipped his lights. It was not, however, until he was about 50 yards away that he realized that the lights were those of a car on the wrong side of the road when he reduced his speed to about 25 m.p.h. and swerved to his left on the gravel edge of the road by which time he realized that the said vehicle was stationary but it was then too late to avoid a collision. On appeal it was held that the State had failed to prove its case of negligence since the dangerous position in which the appellant found himself had not been shown to be of his own making.

CHAPTER XVI

THE DRIVER'S DUTIES REGARDING HIS CAR

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1. MECHANICAL DEFECTS

The motor vehicle has, unfortunately, been responsible for more deaths and injuries than any other mechanism of convenience known to modern science. It has been said that, travelling at 60 m.p.h., it possesses the same destructive power as a six-inch shell; consequently the description given to it in *R. v. Freeman*, 1931 N.P.D. 460, as being a 'vehicle of dangerous potentialities', is today accepted as an axiomatic fact (cf. *R. v. Du Toit*, 1947 (3) S.A. 141 (A.D.); *S. v. Claasen*, 1962 (3) S.A. 308 (O) at 311; *S. v. Stavast*, 1964 (3) S.A. 616 (T); *R. v. Smit*, 1963 (4) S.A. 824 (C) at 826). It follows that if a driver takes a motor vehicle out on to the public highways **knowing** that its mechanism is defective in some material respect, and that such defect is likely to lead to his losing control of the vehicle, to the danger of others, he may be found guilty of negligence if, owing to such defect, injury or damage is caused to another person or property (*Barkway v. South Wales Transport Co., Ltd.* [1950] 1 All E.R. 392 (H.L.); *South British Insurance Co., Ltd. v. Mkhize*, 1965 (1) S.A. 206 (A.D.)). The position is no different where the court finds as a fact that he **ought** to have known of the defect (*R. v. Steynberg*, 1928 E.D.L. 1). In this case, Gane J. said:

'A person using a motor-car must examine the vehicle from time to time to see that it is in proper order, and if through carelessness in that respect damage is caused, he is liable.'

While, however, it is the driver's duty to see that his motor vehicle is in a sound and fit condition (*Page v. Malcomess & Co.*, 1922 E.D.L. 284; *Phillips v. Britannia Laundry* [1923] 1 K.B. 539), such duty is not an absolute one in the sense of constituting some sort of warranty, for all that is required of him is to ensure that his vehicle does not suffer from some mechanical defects (*Star Motors v. Swart*, 1968 (3) S.A. 60 (T) at 63; *Ferber v. Caledon Insurance Co.*, 1952 (2) P.H., O. 24 (C)), i.e. that it is not in such a dilapidated state as to constitute a danger to other road-users (*Donald v. Berman*, 1960 (1) S.A. 365 (S.R.)). The duty, correctly stated, therefore is that the driver should take reasonable care to see that his vehicle is reasonably roadworthy (*Clements v. Esmeraldo*, 1946 C.P.D. 964). In this case it was held that the defendant was not liable for damage caused by his **wheel falling off**, after it had been incompetently put on by a garage employee, in the absence of evidence that he knew the work was negligently done or that the garage employee was incompetent. In *Ferber's* case (*supra*) it was considered that, if the driver was unskilled in motor mechanics, he should request some person with the necessary skill to make an inspection of his vehicle from time to time. Here the Court found that the defect in the braking mechanism had been developing for a considerable time before the accident. See also *Hickey v. McDonald*, 1960 (4) S.A. 451 (F.S.C.), and *R. v. Moolman*, 1935 E.D.L. 433. In *Donald v. Berman* (*supra*) on the other hand, liability was imputed to a garage owner who had lent his car to the first defendant who, whilst driving it, had caused damage to plaintiff by the bursting of a palpably worn tyre.

Where there is no apparent reason, other than carelessness on the part of the driver, to account for the accident, the State is not obliged to go further and negative the suggestion that the damage complained of was

perhaps due to a mechanical defect in the car (*R. v. Whiley*, 1935 C.P.D. 466).

Statutory Provisions. Section 19 of the various Ordinances stipulates that a registering authority shall not issue a clearance certificate if the motor vehicle is a second-hand one or one which had been built-up, or reconstructed, unless and until a 'roadworthy certificate' has been issued in respect thereof. In regard to 'Public Motor Vehicles' section 108 of the regulations under the said Ordinances make it a criminal offence for a person to operate any such vehicle upon a public road unless it is in all respects in a good state of repair. This provision appears to be an absolute one but, as will be seen, there must be some guilt nexus in this regard which may be disproved by the accused.

(a) STEERING APPARATUS

Having regard to the rule of law that 'He who asserts must prove', it is extremely difficult, and sometimes impossible, after the event, for the plaintiff (or the State) to prove that the cause of the collision was due to a defect in the steering apparatus of which the defendant (or accused) ought to have been aware, and in most cases this feature is set up as a defence by the defendant. The conclusion properly follows that for such **unexpected** contingency there is no *culpa* imputable to the driver, but the facts of the case (which would include the finding of a fresh fracture in the metal-work of the steering gear) would have to be such as to render this explanation a reasonable assumption. The position would obviously be otherwise if it could be established that the driver **knew**, or ought to have known, that the mechanism of his car, in this respect, was defective. Even so, the plaintiff may still be able to show that the defendant had **adequate time**, after the sudden default of his steering apparatus, to apply his brakes and pull up to avoid the accident (*Lombard v. Van Eysen*, 1941 C.P.D. (J/C 266/41), *post*, p. 324).

Illustrative cases

In *Arthur v. Bezuidenhout & Mieny*, 1962 (2) S.A. 566 (A.D.), respondent had sued the appellant for damages arising out of a collision in which both drivers had been killed. At the trial in the court *a quo* the plaintiff had countered the defendant's evidence of inevitable accident averred by him to be due to a defect in the steering apparatus, and had led evidence from an expert witness to prove that the severing of the steering sector of the shaft was a fresh one and had probably been caused by the collision complained of; consequently, he contended, that there was no latent defect existing in defendant's vehicle prior to the collision. The defendant also called expert evidence to show that the break in question was a torsional fatigue fracture. Held, on appeal, that the court below had erred in placing any onus on the defendant, but that as, on a balance of probabilities, the collision had been caused by the negligence of the defendant, his appeal failed.

The case of *De Wet v. Adams*, 1935 T.P.D. 247, is also illustrative in this respect. In that case a collision occurred in the afternoon when two cars were approaching each other on a main road. Defendant's car suddenly swerved to the right-hand side of the road and the two vehicles collided. The road was free from camber and there was plenty of space on both sides of the tar macadam for the vehicles to have passed in safety. Defendant's plea was that his steering apparatus suddenly, and without warning, went wrong and ceased to function because of a fracture of the king-pin, which fracture was not known to the defendant and could not have been discovered by him. An examination of the defendant's car after the accident showed that a king-pin at the end of the front axle was, in fact, broken, but from the technical evidence it appeared highly improbable

that the broken king-pin could have caused the swerve. The Court held, however, that, as this explanation might reasonably be true, the plaintiff had failed to discharge the onus cast upon him and granted absolution from the instance. Per Tindall J.:

'A great deal of evidence dealt with the effect of a broken king-pin on the steering apparatus of a motor-car. The case was not made on behalf of the plaintiff that a broken king-pin would cause a noticeable looseness alternating with noticeable stiffness in the steering of the car, which should indicate to the driver that the steering apparatus required examination and attention, and that the defendant was liable on the ground of negligence constituted by his failure to have the front axle properly adjusted. Had such a case been made on behalf of the plaintiff much could have been said in favour of it because in view of the speed at which motor vehicles travel and the danger thus created, a strong case could be made in favour of the view that a **driver who notices a marked play or stiffness in his steering gear ought at once to have it examined by an expert**, and that if he fails to do so and his car runs off its course, he ought to be liable.'

In *R. v. Moolman*, 1935 E.D.L. 443, the accused had been convicted of culpable homicide. The facts were that he, having been informed that the steering gear was loose, had sent the car to a garage and had it overhauled by a mechanic who reported that the steering gear was in order. The accused, with the mechanic, tested the car on a trial run and found it was roadworthy. He then took delivery of it and took it on a 125-mile trip without mishap. Later, on another trip, he had the accident which was the subject of the charge. On appeal, it was held that the accused had acted reasonably and that he could not be regarded as being responsible for the fact that the mechanic did not do his work as well as he might have done. The conviction was accordingly set aside.

In the case of *R. v. Naidoo*, 1936 N.P.D. 39, on the other hand, the Court of Appeal held that the magistrate was justified in disbelieving the accused when he stated that the cause of the accident was due to a collapse of his steering gear, by reason of the fact that (a) the evidence showed the accused had swerved to his left again after the impact, and (b) the accused had only introduced this defence at the end of the trial and as an afterthought.

Defendant's steering apparatus had broken as a result of his car striking a pot-hole. This caused his car to veer to the right and he collided with the plaintiff. Held, that he should have applied his brakes so as to pull up sooner than he did, and he had therefore been negligent in omitting to do so (*Lombard v. Van Eyssen*, 1941 C.P.D. (J/C 266/41)). Presumably, in this case, he had sufficient time to do so.

(b) BRAKES

The brakes of a car being an important item in regard to safe and careful manipulation of a vehicle, it is the duty of the driver firstly to see that his brakes are in working order, and secondly to apply them at the appropriate time in order to bring his car to a stop for the purpose of averting a collision with any person or thing in his path.

(i) Defective brakes

Liability. One of the paramount features of careful driving is the assurance a driver must have of being able to slow down or stop his vehicle within a reasonable distance when the urgency of the occasion demands such action. It follows that any person who **knows**, or **ought to know**, that his brakes are in a **defective** condition may in certain circumstances be held responsible for injury resulting to another as a direct result of a failure of his brakes to act properly (*R. v. Zwartbooi*, 1930 E.D.L. 192; *R. v. P. Hall & Co. (Pvt.) Ltd.*, 1966 (4) S.A. 223 (R., A.D.)). The mere fact, however, of having ineffective brakes is not therefore per se evidence of negligence (*R. v. Hendrickse*, 1946 P.H., O. 3 (G.W.)), but that it may be an aspect of folly or neglect, seriously to be considered when arriving at a conclusion as to whether a party should be held liable for the death of

another person, or injury to his vehicle, there can be no doubt (*R. v. Times*, 1941 E.D.L. 38; *R. v. Steenberg*, 1942 E.D.L. 267. But the position is otherwise where a person knows that, owing to the defective character of his brakes, the car he is driving is prone to bring him more to one side of the road and take him out of his course, when he seeks to slow down (*R. v. Stripp*, 1940 E.D.L. 29). See also *Fourie v. Coetzee*, 1947 (2) S.A. 646 (S.W.A.), and *R. v. Thebe*, 1947 (1) A.S.A.R. 700; *R. v. Spurge* [1961] 2 All E.R. 688 (C.A.)). While, therefore, a motorist is under no absolute duty to ensure that the brakes of his vehicle are not defective, he should at least take reasonable precautions to examine them, or have them examined, with a reasonable degree of regularity, since every reasonable and prudent man knows, or ought to know, that the component parts of a motor vehicle become worn and may be a danger to other users of the road (*Ferber v. Caledon Insurance Co.*, 1952 (2) P.H., O. 24 (C)). Thus where a collision was found to have been due to defective brakes, caused by a leakage of oil, it was held that the driver thereof, who had owned it for fourteen months and had driven it for some 6,000 miles, had been negligent in not having taken this precaution (*Star Motors v. Swart*, 1968 (3) S.A. 60 (T)).

On the other hand a driver is not required to drive on the assumption that his foot-brake might suddenly and unexpectedly fail (*S. v. Southern*, 1965 (1) S.A. 860 (N) at 862, and *R. v. Longhurst*, 1950 (4) S.A. 647 (T)), since such a standard of care would virtually paralyse traffic on busy highways (*Rankison & Sons v. Springfield Omnibus Services (Pty.) Ltd.*, 1964 (1) S.A. 609 (D) at 618).

Therefore it is not the mere fact of the failure of the brakes which can be set up as sufficient to relieve defendant from responsibility, but he must show that such failure was (a) unforeseen and (b) due to no negligence on his part (see *Huysamen v. Venter*, 1955 (2) P.H., O. 6 (T)).

Proof. Knowledge that the brakes were defective is inferential if the accused has used the car shortly before the accident (*R. v. Steenberg*, 1942 E.D.L. 270), and it has, accordingly, been held that the failure by the driver of a borrowed and much used car to ascertain by trial or otherwise that the brakes thereof are in good working order and condition may be regarded as negligence justifying a conviction where a collision occurs as a result of his failure to pull up timeously (*R. v. Steynberg*, 1928 E.D.L. 1; *Lawrence v. Ross*, 16 C.T.R. 382; *Otterstroom v. Estate Stephen Bros.*, 17 C.T.R. 338). If the accused's defence is that the brakes were not properly adjusted and the brake-cables stuck in their casings, the onus is on the State to establish the condition of the brakes at all material times (*R. v. Badenhorst*, 1951 (4) S.A. 532 (N)). The court will, however, be reluctant in accepting the mere *ipse dixit* of the defendant to the effect that his brakes have suddenly and unexpectedly failed and will usually require some corroborating evidence in support of such contention (*Rankinson's case (supra)*). Such support was found in *Coleman v. Mabuza*, 1963 (2) S.A. 498 (T), where it was found that only one brake mark appeared on the road after the collision, a fact which manifestly supported the defendant's assertion in this regard. In this case it was ruled that the plaintiff had failed to establish his allegation that the defendant had been negligent in travelling too fast, or too closely, behind the plaintiff.

On a charge of reckless and negligent driving, it is not sufficient merely to show that the brakes of the car concerned were inadequate or insufficient. Recklessness or negligence would have to depend also on the speed of the car and the surrounding circumstances generally (*R. v. Sherally*, 1929 N.P.D. 309; *R. v. Pendrey*, 1936 T.P.D. (J/C 680/36)). The act of abandoning a bus containing passengers, knowing that the brakes are defective, is a negligent one (*R. v. Msimango*, 1950 (2) S.A. 205 (N)).

A failure to have adequate and efficient brakes is a statutory offence under sections 21 and 22 of the regulations of various provincial ordinances, and these provisions may be regarded as a guide in considering the *culpa* of the party concerned (*R. v. Hendrickse*, 1945 G.W.L.). In *R. v. Goodman*, 1942 C.P.D. 379, it was ruled that the brakes of a car should have the regulation efficiency whether the car or lorry is loaded or not.

In a criminal prosecution for having defective brakes it is not sufficient for the State merely to call an expert, who has examined the vehicle in question, and to adduce his opinion that they were defective, for the expert must state, in evidence, the observable facts emerging from his tests in order that the court may decide for itself whether there was anything wrong with the braking or steering system (*S. v. Govender and another*, 1968 (3) S.A. 14 (N) at 19). Accordingly, where the State seeks to prove its case of driving with inefficient hand-brakes in contravention of the regulations it must prove beyond reasonable doubt that the test was carried out on a level, dry road surface at a speed in fact of 20 miles per hour (*R. v. Matambanadzo*, 1967 (4) S.A. 265 (R.A.D.) at 267).

In the following cases the courts held that the driver was **not liable** in law for the condition of his brakes:

Where, although the brakes were defective, the proximate cause of the death of the deceased was due to his having swerved with his cycle into the way of the accused's car when only a few yards away from him (*R. v. Molife*, 1935 E.D.L. 252; *R. v. Hawkins*, 1934 E.D.L. (J/C 380/34), and *R. v. Steenberg*, 1942 E.D.L. 267).

Where, owing to the fact that the car had recently been greased, some grease had worked its way on to the brake-band thereby causing an uneven application of the friction between the brake-band and the wheels, a fact which became apparent only when there was a sudden and violent application of the brakes, it being shown that the effect of this uneven application would be to cause the car suddenly and unexpectedly to swerve and leave the road (*Petersen v. Hartman*, 1935 E.D.L. 59).

The accused drove a lorry fitted with a 'booster' which works only when the engine is running. Up a steep incline the engine stalled and the ordinary brakes could not prevent the lorry running backwards and killing a person (*R. v. Simon and another*, 1936 T.P.D. 217). In this case the accused had used the car previously and had found nothing wrong with it. See also *R. v. Thebe*, 1947 (1) A.S.A.R. 700.

In the following cases the driver was **held liable**:

R. v. Msimango, 1950 (2) S.A. 205 (N): While a bus was being driven by appellant up a steep hill its engine stalled. Appellant kept it stationary by applying his hand-brake, which he knew was defective in that it had to be held in position by hand. The conductor got out and poured petrol into the carburettor in an endeavour to get the engine started. While this was being done the petrol caught fire and the appellant, on seeing this, jumped out of the bus. The vehicle ran backwards downhill and over a precipice, with the result that three passengers were killed. Held, that he had rightly been convicted of culpable homicide.

Where a driver has driven a considerable distance, during which time he must have applied his brakes on the journey, it is idle for him to allege that he did not know of their defective condition (*R. v. Steenberg*, 1942 E.D.L. 267).

(ii) Applying brakes

This aspect of negligence is usually treated of under the heading 'Proper Control of Car' (*post*, p. 333), since, in the efficient control of an automobile the prompt and adequate application of one's brakes are a *sine qua non* of careful driving, for if a party sees that, unless he applies his brakes, a collision will result, it is clearly his duty to do so immediately (*Lombard v. Van Eyssen*, 1941 C.P.D. (J/C 266/41)).

While the courts are loth to hold that a driver has been guilty of *culpa* when he discovers that his brakes have suddenly and **unexpectedly** failed (cf. *R. v. Fourie*, 1950 (4) S.A. 571 (N), and *R. v. Longhurst*, 1950 (4) S.A. 647 (T)), nevertheless, in such event, he should bring his hand-brake into operation or endeavour to put his vehicle into a lower gear, provided, of course, he has sufficient time to do so and is not confronted with so sudden an emergency that there has been insufficient opportunity to take such precautionary measures (*S. v. Claasen*, 1962 (3) S.A. 308 (O)). It follows, therefore, that if a driver, upon such unexpected failure, does all that a reasonably skilful man would do in the circumstances, he cannot be deemed to have been guilty of negligence (*Botha v. S.*, 1969 (1) P.H., H. (S) 35 (O)).

In *Crook v. Erasmus*, 1927 E.D.L. 142, it appeared that, owing to the defendant's leaving his car on a gradient, with the brakes inadequately applied, the car ran down and collided with the plaintiff's car, causing the latter to be injured. The Court held that the defendant was liable in damages even though he had, at the plaintiff's invitation, left his car and gone to the plaintiff's assistance. (See *post*, p. 404.) Where a car is left on a gradient and almost immediately proceeds to run away, the court will infer that the brakes were not properly applied before it was left and, in the absence of an acceptable explanation to account for the injury caused as a consequence, it will hold the driver of the car liable in damages (*Naude v. Transvaal Boot & Shoe Manufacturing Co.*, 1938 A.D. 379, and *Watt v. Van der Walt*, 1947 (2) S.A. 1216 (W)). Section 119(1)(f) of the various provincial ordinances makes it a criminal offence to allow a vehicle to remain unattended on a public road without applying its brake (or adopting other method) as will effectively prevent the vehicle from moving from the position in which it is left.

(iii) Stopping distances

In most cases where the question to be decided is whether the driver of a motor-car applied his brakes to stop his car within a reasonable distance, it is vital to the issue to know whether his car is one with four-wheel brakes or one with two-wheel brakes, and also to ascertain the approximate speed at which the party concerned was travelling. From these data it is possible to gather, from the Table of Stopping Distances (see Schedule 'A', *post*, p. 526) whether he has exercised careful and adequate control over his car in the particular circumstances. Conclusions in this respect must, perforce, only be approximate, for when tests are made as to the ability of a driver of a motor-car to stop his car within a given distance, any exceptional skill of the driver, and the fact that the driver was not suddenly or unexpectedly tested, should be borne in mind in applying the result of the test (*Bezuidenhout v. Berman*, 1929 O.P.D. 148).

The court will, of course, not take judicial notice of the table, so that stopping distances will have to be properly proved, either by calling an expert witness oneself, or by eliciting the facts in cross-examination of the driver whose car is alleged to have been involved in the accident, as was done in *Dickinson v. Galante*, 1949 (3) S.A. 1034 (S.R.), and *Heneke v. Royal Insurance Co.*, 1954 (4) S.A. 606 (A.D.). Such tables should, however, be circumspectly used, and a reasonable allowance should be made for a 'reaction time', i.e. time occurring between the driver's perception of the danger and his actual application of the brakes of his vehicle (see Schedule 'B', *post*, p. 526), and (*Pretorius v. African Gate & Fence Works*, 1939 A.D. at 575; *R. v. Phillips*, 1949 (2) S.A. 671 (O) at 677; *Sutherland v. Banwell*, 1938 A.D. at 482; *Steyn v. Nunes*, 1951 (3) S.A. 96 (T) at 99; *Heneke v. Royal Insurance Co.*, 1954 (4) S.A. 606 (A.D.) at 613). This allowance for reaction time should not be made, however, where from the facts of the case it appears that the driver ought to have been aware of the danger long before he did, in fact, appreciate it (*Sutherland v. Banwell* (*supra*) at 482 and 484). In considering stopping distances, moreover, the court cannot, as a rule, place any reliance on unverified estimates of distances (*Hodgson v. Hauptfleisch*, 1947 (2) S.A. 98 (C)) since, in retrospect, such estimates can usually be only approximate and, in most cases, be mere guesswork or speculation, particularly in the case of persons unaccustomed to measuring distances (e.g. women and young children) (cf. *Van der Westhuizen v. S.A. Liberal Insurance Co.*, 1949 (3) S.A. 160 (C) at 168-9). Moreover, a heavily laden vehicle places an extra strain on the brakes thereof, thereby decreasing the stopping distance, while the frictional effect of the road surfaces vary considerably, e.g. a dry, clean tarmac road provides greater friction than a wet or slippery one or one covered with loose gravel. Moreover, much depends on the gravitational force involved, i.e. whether the vehicle concerned is proceeding uphill or downhill. (See Metcalfe in Cooper and Bamford, pp. 791-9.) (See also *ante*, p. 322, and *post*, pp. 494-5.)

A cyclist proceeding at 4 m.p.h. who is fully prepared to stop can do so in 2 feet; but this should not be held against him when he is unexpectedly confronted with an obstruction, for he may be momentarily upset thereby (*Brick v. Armour*, 1945 S.R. 157).

(c) ACCELERATOR STICKING

What is the position of the driver of a motor-car who finds that his accelerator has suddenly and unexpectedly jammed? Obviously he should, if he has time to do so, declutch, put his car into neutral, switch off the ignition of his engine and apply his brakes. The only authority which appears to be available on this point is that of *R. v. Beeton*, 1931 P.H., O. 23 (C). The facts in this case were that the accused, being desirous of passing a car ahead of him, accelerated, but, while he was passing, found that the accelerator had stuck and that his car continued to gather speed. Just at this juncture another car edged out into the road and a collision occurred between the two cars. The magistrate accepted the accused's explanation but decided that the accused was guilty of negligent driving because he should have declutched or put his car into neutral gear and applied his brakes and so have pulled it up. The Court, on appeal, how-

ever, held that although it appeared that the accused should have taken these necessary steps, yet (a) there was no evidence to show how long it would take before accused could reasonably be expected to perform this operation; (b) nor was there anything to show whether the performance of this operation would have been sufficient to prevent the accident; (c) if the magistrate was going to be influenced by the fact that the accused had not declutched and applied his brakes he should have given the accused an opportunity to say why he did not take this course, but no question was put to the accused on this point; (d) the distance the accused travelled after his accelerator stuck had not been found by the magistrate, and the Court, therefore, did not know whether the accused had had a reasonable time within which to decide how to act. The conviction was accordingly set aside.

These considerations, therefore, supply a guide to the litigant in a trial, indicating that he may still be able to succeed in his action if he can establish the four elements found to be lacking in *Beeton's* case.

(d) ENGINE STALLING

The position of a driver of a car who finds that his engine has stalled is reflected in the dictum of Barry J. in *R. v. Simon and another*, 1936 T.P.D. 217:

'It does not seem to me that it is negligence on the part of the driver if he fails to control a vehicle because the engine stalls. It is said that the driver should expect the engine to stall. I do not agree. I think that the driver is entitled to assume that an engine, having started to run, will continue to run until he turns it off; so that there is no negligence as far as the appellants were concerned in the engine having stalled.'

On the other hand, the driver of another vehicle cannot reasonably expect a motor-car to stall and stop in the way of his oncoming car (*R. v. Fowler*, 1930 P.H., H. 77 (C)). In this case the accused, a tram-driver, had been convicted of damaging a motor-car, driven by the complainant, upon evidence which disclosed that at an intersection the complainant's car stalled, and stopped dead, on the tram-line. On appeal, the Court held that, since the accused must have been somewhat taken aback at this happening, he could not be expected to have applied his brakes as quickly as he might otherwise have done, and the conviction was accordingly set aside. Stalling, however, may be caused by bad driving, in which case the driver might be responsible. But a person is, however, not entitled to act negligently after his car has stalled (*R. v. Msimango*, 1950 (2) S.A. 205 (N), for the facts of which see *ante*, p. 324).

Whether the position is any different where the driver is proved to have driven his car into a drift, or causeway, flooded with water as a consequence of which the engine stalls (either because the exhaust became submerged or because the battery failed or because the fan had picked up water and thrown it over the engine), was considered in *Stride v. Reddin*, 1944 A.D. 162 at 169-74. In the circumstances of that particular case, however, it was decided that such act did not constitute negligence. It is submitted that the test is: did the driver know, or should he have known, that the depth of water was such as would probably cause a stalling of the engine of his car? (See also *Flooded Streams and Drifts*, *post*, p. 384).

(e) WHEEL FALLING OFF

In *Clements v. Esmeraldo*, 1946 C.P.D. 964, plaintiff claimed damage done to her parked car by defendant's car. The latter averred that his wheel, which had been put on by a garage employee that morning, had suddenly come off. The wheel showed some old and some new fractures. Held, that the defendant should not be held liable for any inefficiency on the part of the garage employee (at 971) and that he was not liable in damages. See also *Phillips v. Britannia Hygienic Laundry* [1923] 1 K.B. 539 at 556, and *Stennet v. Hancock & Peters* [1939] 2 All E.R. 578, in both of which cases the wheels of the respective vehicles had come off, and here it was held that the motorist is not liable for the negligence of a competent repairer.

2. HOOTER

Merely to have a defective hooter on one's car is not necessarily proof per se of negligence (*Lankester v. Miller* (1910) 4 B.W.C.C. 80), but since it is the duty of the driver to give adequate warning of his approach it may be premised that the driver who ventures out on to a highway, where other persons and vehicles are likely to be found, without a recognized mechanical means of warning pedestrians and drivers of other vehicles of his approach and proximity, is liable to be found guilty of *culpa* should a collision occur as a result. Section 74 of the regulations of the various provincial ordinances makes it a criminal offence to operate a motor vehicle which is not equipped with a warning device audible from a distance of at least 300 feet. The whole question regarding giving adequate warning to other persons by means of hooting is dealt with later under 'Signals' (*post*, p. 436), but from the point of view of giving proper notice of one's approach it is immaterial in the eyes of the court whether the driver failed to hoot because he was dilatory in this respect, or because he had no, or an inefficient, hooter on his car. In both cases he may be found negligent. In the following cases the court has ruled that it was negligence on the part of the driver not to hoot in the particular circumstances (*R. v. Senekal*, 1931 P.H., O. 9 (E); *Wagenaar v. Thomas*, 1930 W.L.D. 81; *Naude v. Erwee*, 1932 O.P.D. 175).

3. LIGHTS

(a) WHILE MOVING

The obligation of the driver of a vehicle regarding his lights is closely related to his obligations to keep a proper look-out and to give adequate warning to others of his presence on the road at night-time (see *Blaiberg v. Kleynhans*, 1938 C.P.D. 305 (*post*, p. 385)). In all the provinces it is a criminal offence to have headlights of insufficient strength and intensity to show up normal objects on the road under usual weather conditions at a distance of 500 feet.

At common law it has been laid down categorically that one ought, at night-time, to have lights of sufficient brilliance to show up a pedestrian at a distance which will enable one to avoid a collision with him and, furthermore, one ought not to drive at such a pace that when one's lights do reveal the pedestrian, the latter, standing in the street, cannot escape

(*Wagenaar v. Thomas*, 1930 W.L.D. 81). This case also decided that it was not negligent for the plaintiff, a pedestrian, not to carry a lamp.

Where the accused, driving in a main street, had completely turned off his lights when passing another car with bright headlights, and had thereafter proceeded along the street for a considerable distance with his lights extinguished and had collided with the complainant, because, as he said, he was blinded by the headlights of the other car and was unable to see the person with whom he collided, the Court, on appeal, held that he had rightly been convicted (*R. v. Stephenson*, 1928 C.P.D. 114). Per Watermeyer J.:

'In the present case the accused turned his lights right out, and he knew he could not see, because he says himself that he was blinded by the lights of the oncoming car. Not only that, but his lights being out, they would not give warning of his approach to anybody in the street. If his lights were on they would have given a warning that he was coming down the street. Knowing that he could not see, and knowing that his lights could not give any warning to anyone in the street, he proceeded to drive a considerable distance along the main street. Now in my opinion, as a question of fact, it is negligent for a man to drive a considerable distance down the main street of a town like Ceres, knowing that he cannot see, and knowing that his car is showing no lights, which can warn anyone in front of him.'

See also *R. v. Pole*, 1941 T.P.D. 177, the facts of which case were that the appellant suddenly discovered that his lights had failed. He first looked at his switch and, on finding it in order, then decided to pull up and applied his brakes gently but collided with a pedestrian on the side of the road before the car had come to a standstill. He had travelled some 20 yards without lights before the collision occurred. Held, distinguishing *R. v. Hammer*, 1926 C.P.D. 87, that he had rightly been convicted.

There can be no doubt that it is foolish to travel at night with the *left-hand headlight* only burning, for such action can easily mislead an oncoming traveller as to the nature of the vehicle he is approaching and cause him to make a miscalculation as to the berth he should allow in passing. In *Pressley v. Burnett*, 1914 S.C. 874, the Court characterized such conduct as culpably negligent and awarded damages accordingly. See, also, *Cantamessa v. Reinforcing Steel Co.*, 1940 A.D. 1; *Steyn v. Nunes*, 1951 (3) S.A. 96 (T), and *Minne v. Santam Insurance Co.*, 1962 (4) S.A. 410 (C).

A motorist who, at a distance of 50 yards, sees another vehicle approaching partially on the wrong side, on a country road at night-time, and expects that the vehicles will pass dangerously close to each other, but refrains from swerving more to his left, in the reasonable but erroneous belief (owing to the glare of the other vehicle's headlights) that his car was already on the extreme edge of a road of unknown surroundings, is not guilty of negligence (*Jojo v. Botha*, 1949 (3) S.A. 417 (E)).

(b) WHILE STANDING—PARKING

Whether it is negligent for a person to leave his vehicle standing on an unlighted road without some light to caution travellers that it has been parked there will depend on the surrounding circumstances (*John Williams Motor's Ltd. v. Minister of Defence*, 1966 (3) S.A. 27 (A.D.) at 30). If a person on a dark night collides with a vehicle which is so parked that it is difficult to be observed, then, *prima facie*, he is responsible for the resultant

damages occasioned by the collision (*Rose v. Madden*, 1913 T.P.D. 82). The decision in *S.A.R. v. Estate Saunders*, 1931 A.D. 276, is also a case in point. Here the Railway Administration was held liable in damages for allowing a trailer, unmarked by any lights, to be left on a road, with the result that the plaintiff's bus had collided with it at night-time. Compare *Hodgson v. Hauptfleisch*, 1947 (2) S.A. 98. See also *Mullock v. Pan African Roadways*, 1949 P.H., O. 4 (S.R.).

In *Venter v. London & Lancashire Ins. Co.*, 1951 (4) S.A. 554 (A.D.), a driver had approached a stationary car with the left headlight only burning. He was temporarily blinded and was over the centre of the road on his wrong side when he collided with the driver of the stationary car who was standing alongside it. Held, that in view of the contributory negligence of the driver of the stationary car in continuing in that position after his car had already been struck a glancing blow by a previous car, and in going out into the middle of the road when visibility was bad, his claim for damages failed. Today there would be an apportionment of damages.

Sections 31 and 32 of the regulations, under the various provincial ordinances, stipulate that no person may stop or park a motor vehicle unless the headlamps emit a 'passing beam' (i.e. at dip) visible from a distance of 150 feet or, alternatively, with the parking lights burning. In the O.F.S., however, it has been held that there must be some *mens rea* before this offence can be committed; consequently a conviction is not justified where the accused has a lawful excuse, such as when his lights have failed, due to no negligence on his part, and if it is impossible for him to move his vehicle off the road (*S. v. Van Rensburg*, 1960 (3) S.A. 828 (O)).

Red and White Lights

In *Minne v. Santam Insurance Co.*, 1962 (4) S.A. 409 (C), Van Heerden A.J. held that it was 'an extremely dangerous practice' to have white lights shining backward instead of a red light. The reason given for such ruling is that 'it is calculated to mislead drivers into believing that it is the headlamps of an approaching vehicle', but it is questioned whether this makes any reasonable difference whether the driver is under the impression that the said vehicle is approaching or receding, as long as he is careful to keep out of its way. He might however, be misled into thinking that there was a vehicle approaching him on its incorrect side of the road.

(c) DIMMING OR DIPPING

A person who dims his headlights, on meeting another car, should in addition invariably decrease his speed so that he can, in an emergency, draw up within the range of his visibility (*Ramatlo v. Kurland*, 1930 T.P.D. 435 (see *ante*, p. 307), and *R. v. Botha*, 1937 P.H., O. 1 (N); *John Williams Motors* case (*supra*), and *S. v. Van Deventer*, 1963 (2) S.A. 475 (A.D.) at 481).

Prior to 1937 there appeared to be no authoritative decision on the obligation to dim one's own headlights upon the approach of another vehicle from the opposite direction, it being generally regarded as an act of courtesy to do so. That it is exceedingly disconcerting to be faced on a narrow road at night-time with blazing and dazzling lights is the experience

of everyone, and at some time or other the courts may have to face the delicate problem as to whether a motorist, who fails to dim his lights when approaching an oncoming car, is not guilty of negligence. The problem is beset with two difficulties. On the one hand it may be competently argued that should a party dim his lights he will then be unable to see where he is going; on the other hand not all motor-cars have been provided with dip lights. Modern invention appears to have solved the first difficulty by providing mechanical apparatus for the dipping of one's headlights, and the legislature has now, in most of the provinces, made it obligatory to dim or dip one's headlights in order to prevent dazzling a driver proceeding in the opposite direction. (See Regulation 30(d).)

From a common-law point of view much would naturally depend on the strength of the blinding lights. Gibb, in *Collisions on the Highway* (p. 113), says:

'It is the duty of a motorist to give adequate warning of his approach at night by means of adequate lights. At the present time more accidents occur because of too powerful lights than because of inefficient lights. It cannot, however, be said that there is as yet any duty to carry lights which shall not be too bright. If a driver finds that the lights of an approaching vehicle are so bright that he is impeded in his driving, and that it is risky to continue to drive, it would seem that **it is his duty to slow up or even stop**. If, however, a collision with the over-brightly lit car occurred, there would probably be good ground for alleging contributory negligence.'

This contention would appear to be correct. In conclusion it should be noted that most of the by-laws of the large cities of the Republic prohibit the use of over-brightly lit headlights within their urban areas.

Naturally, a person who travels with dipped or dimmed headlights should maintain a **good look-out and drive slowly** so as to be able to draw up within the range of his visibility, that is to say, he should be rather more vigilant in exercising a careful look-out (*McLaughlan v. Barnes*, 1954 (4) S.A. 503 (S.R.)). Where a driver failed to observe this rule, but travelled at 35 m.p.h. with headlights dipped and giving him a visibility of only 50 feet, the Court refused to interfere with his conviction, or sentence of one year's imprisonment, for running down some soldiers who were marching in the same direction on the same side of the street (*R. v. Eker-mans*, 1942 C.P.D. 169).

In *S. v. Jackhals*, 1961 (4) S.A. 573 (C), on the other hand, it was held that it was not necessary to compel a driver at all times to travel within the range of his visibility of his dim light merely because, from time to time, other road-users were brightening their lights. Moreover a driver cannot be convicted of the offence of driving without reasonable consideration for others merely because he failed to dip his lights, unless the complainant proves that he was actually inconvenienced thereby (*Joubert v. S.*, 1969 P.H., H. (S.) 40 (T)).

4. SIDE-CURTAINS

A type of car rapidly falling into obsolescence is the 'open tourer' which obliges the driver to erect side-curtains to provide shelter against the elements. The erection of such curtains to keep out the wind, rain or cold, however, considerably limits the breadth of vision of the driver and he should, on that account, exercise greater caution when driving under such conditions (*Wright v. Stuttaford*, 1929 E.D.L. 377).

In this case the defendant's servant, as a result of putting up the side-flaps to the car he was driving, had not been able to observe a railway crossing with the result that he collided with a train thereon. Fortunately for the plaintiff in this case, the Court found that the effective cause of the collision was the negligence of the Railway Administration and that the plaintiff, the owner of the car in question, was entitled to damages. See also *Webber v. Solomons Motors (Pty.) Ltd.*, 1937 E.D.L. 299, where the plaintiff had entered an intersection with his side-curtains drawn and it was held that, in view of this fact, he should have realized that the arc of his vision was diminished, and should therefore have taken greater precautions.

In the case of *S.A.R. v. De Beer*, 1936 A.D. 262, it was decided that, though the celluloid flaps of the plaintiff's car were up, this fact did not, in those particular circumstances, affect the hearing or visibility of the driver and that, though he had, in fact, taken special precautions, the effective cause of the collision was due to the negligence of the defendant Administration. (See *post*, p. 467.)

The position is no less different where the windows of a car are up and so badly frosted that one's visibility to right and left is considerably obscured (*Delport v. Clarence*, 1939, N.P.D. 311).

5. OPENING DOOR

Having regard to the fact that traffic on the main thoroughfares tends to become more and more congested and, as a consequence, vehicles are prone to pass each other at closer distances, it is only reasonable to expect that the driver of a car will not, by opening his door, interfere with the stream of traffic which may be passing him from behind (*Levinovich v. Cartwright*, 1933 C.P.D. 216). In this case it was decided that where a motor-car is standing in a public road, especially a main road in which there is a great deal of traffic, the door, opposite to that on the kerb side, should not be opened by anyone without first making sure that there is no vehicle approaching which might come into collision with it. Furthermore, there should be a good look-out, in front and behind, in order to ensure that no oncoming vehicle will not be interfered with or collide with such opened door. Failure to observe such precautions would not be the action of an ordinary reasonable man, and the person opening such door, whether the driver or his passenger, would certainly be guilty of *culpa vis-à-vis* the driver of the approaching car.

The above-mentioned proposition is, however, to be compared with the position under the Motor Vehicle Insurance Act, No. 29 of 1942, section 11(1), where a remedy lies under the Act, in favour of the injured party, where injury or damage is 'caused by the driving' of a motor vehicle: In such cases, once a vehicle has been parked or stopped, and is no longer in motion, it cannot be said that such damage or injury has been 'caused or arising out of the driving' of the insured motor vehicle (*Wells and another v. Shield Insurance Co., Ltd. and another*, 1965 (2) S.A. 865 (C) at 868; *Pretoria City Council v. Auto Protection Insurance Co., Ltd.*, 1963 (3) S.A. 136 (T) at 143-4). In *Wells's* case the driver had moved into a parking bay, switched off his engine, applied his hand-brake and then opened the door preparatory to alighting, when a trackless tram struck the opened door

which protruded into its path. In the *Pretoria City Council* case a passenger had opened the door at a crucial moment after the vehicle had been parked in a parking bay. See also Luntz in (1965) 82 S.A.L.J. 443.

It is submitted that the same consideration would apply were a driver to be prosecuted for 'negligent driving' under the various ordinances.

6. CONTROL OF CAR

That the driver failed to keep proper control of his car is an averment found in the large majority of particulars alleging negligent driving. Such allegation, as a rule, finds substantiation as an inference from the circumstances of the collision (*R. v. Zonduyiza*, 1938 P.H., O. 12 (N)).

In this regard the legislature has decreed that, in order to ensure full control of the car, no person operating a vehicle upon a public road shall permit any person to occupy any position in such vehicle which tends to prevent the driver from exercising complete control over the movements of the vehicle (section 119(1)(c)). It is also an offence for him to permit any person to take hold of, or interfere with the steering of the vehicle while it is in motion or to occupy such a position that he has not a full view of the roadway ahead (e.g. to sit in his lap!) (section 119(1)(d)) of the ordinances. Such action would be a pertinent consideration in a civil action in determining the negligence of the driver concerned.

(a) SWERVING

To swerve one's vehicle in the face of oncoming or following traffic, or where there is a likelihood that any vehicles are about to pass one, without giving any warning of one's intention to do so, can be highly negligent (*R. v. Hawkens*, 1934 E.D.L. (J/C 380/1934; *Pauley v. Marine & Trade Insurance Co.*, 1964 (3) S.A. 370 (W); and *sub nomine* in 1965 (2) S.A. 207 (A.D.) at 212; *Beswick v. Crews*, 1965 (2) S.A. 690 at 695-6). In *R. v. Hawkens* the deceased cyclist and the accused were approaching each other from opposite directions. Had the vehicles adhered to their respective courses they would have passed each other at a distance of some 4½ feet, but when less than 5 yards apart the deceased suddenly swerved to his right, coming directly under the right front wheel of the bus, which went over his neck and killed him. On appeal, the Court found that in the circumstances the death of the cyclist must be attributed solely to his swerve and not in any way to the fact that the accused was on his wrong side of the road. In *R. v. Molife*, 1935 E.D.L. 252, the Appeal Court came to the same conclusion on practically the same facts. See, also, *Bonthuys v. Visagie*, 1931 C.P.D. 75, and *R. v. Sabaan*, 1931 E.D.L. 342. The action of swerving from one's left to the right at an inopportune moment and without adequate warning of intention so to do, is unreasonable if a collision is thereby caused and is just as unreasonable as turning at an inopportune moment, *Beswick's* case, *supra*. On the other hand, an overtaking motorist should not pass too close to the vehicle ahead, but must allow for some degree of sideways motion thereof and, if he sees that the vehicle is swerving or would have to swerve, he should adjust the progress of his car accordingly in order to avoid a collision (*Marine and Trade Insurance Co., Ltd. v. Pauley*, 1965 (2) S.A. 207 (A.D.) at 212) since, where it is clear that the vehicle ahead will have to swerve to avoid an obstruc-

tion (e.g. a parked car), then the overtaking driver ought to **anticipate such movement** and should make allowances for such swerve (*R. v. Greaves*, 1935 E.D.L. (J/C 569/35). See also *R. v. Vlok*, 1937 T.P.D. (J/C 2/37).

In some cases it may be necessary to swerve in order to avoid a collision with oncoming traffic and, in such circumstances, a failure to deviate one's course properly and in good time will constitute negligence (*R. v. Pirie*, 1936 E.D.L. 379) unless the swerve was necessitated by some sudden emergency (see *R. v. Wallach*, 1934 T.P.D. 293 and *ante*, p. 314).

The reasonable action of a driver who finds his car swerving owing to the sudden deflation of a tyre, is to turn his front wheels into the direction of the swerve and to apply his brakes gently (*Brasser v. Friedman*, 1942 W.L.D. at 26).

The aspect of swerving, when it is nothing more than a sudden change of direction without warning, is fully dealt with later under 'Signalling' and 'Turning to the Right or Left' and 'Passing Cyclists' (*post*, pp. 436-8).

Whether a person who swerves to avoid a collision is negligent in failing to see a person standing in the way of his new course was considered in *S.A.N.T.A.M. v. Moolman*, 1952 P.H., O. 16 (A.D.). Here the Court held that the standard of care required of a driver was that of a diligent pater-familias and not that of a nervous person, and that he had not been negligent in the circumstances. But a lorry-driver, who concentrated his attention on some cows at the side of the road and thereby failed to see a brick on the road ahead of him, was found to have been negligent in so behaving, and also for his swerving, in order to avoid the brick, without any warning to an overtaking motorist (*Beswick v. Crews*, 1965 (2) S.A. 690 (A.D.) at 699).

A driver cannot, however, be expected to swerve, in order to avoid a cyclist (riding with no lights and who is invisible until the last moment) when by so doing he would have gone off the road and down an embankment (*S. v. Voights*, 1968 (2) P.H., O. 32 (N)). In *Khumalo v. Santam Insurance Co., Ltd.*, 1968 (2) P.H., O. 50 (A.D.), it was held that, as the overtaking motorist had no reason to anticipate that the cyclist plaintiff ahead would swerve across the road just before being overtaken from behind, the court below had rightly dismissed the plaintiff's claim.

(b) IN A WOBBLE

Where a motorist finds that his car has gone into a wobble he should apply his brakes gently and pull up (see *Marks v. Breitz*, 1932 P.H., O. 40 (W)). The causes of a car's wobbling are many; they may be induced by suddenly striking a 'pot-hole', or may be due to excessive speed, or by inadvertently riding on tram-lines which are projecting from the surface of the road, or, and this is the most common cause, to the fact that the alignment of one's tyres to the wheels is (owing to either wear and tear or to the insertion of a large patch on the tubing) not correct, or it may on the other hand be due to the fact that the wheel has not been properly attached to the hub. It is submitted that if the driver *is aware* of the potentiality of his car to get into a wobble and does nothing to correct its behaviour in this respect, thereby causing damage, he will be liable at the suit of the party injured. The driver will certainly be liable for negligence if he, by his actions or inexperience, is the cause of the car's going into a

wobble (*R. v. Van Dijk*, 1939 E.D.L. 203). In this case the car was veering over to the left and the accused, in endeavouring to correct this trend, turned too sharply to the right, causing it to go into a wobble and overturn, thereby injuring a passenger. Held, he had rightly been convicted of driving negligently.

(c) TYRE BURST

A burst tyre which is unforeseen is often a *casus fortuitus*. There is little that the driver can do but to switch off his ignition and gently apply his brakes. Suddenly to apply them would only make matters worse and would probably capsize his vehicle. For a case of this nature see *Brasser v. Friedman*, 1942 W.L.D. 21, in which the Court resolved that the onus is on the plaintiff to prove that the defendant could have avoided the skid, caused by a suddenly deflated tyre, by some means reasonable in the circumstances, and that the plaintiff had failed to discharge this onus.

There is, however, an obligation on the driver to see that his tyres are in such a condition that they are not likely to burst suddenly (*Donald v. Berman and others*, 1960 (1) S.A. 361 (S.R.); *Barkway v. South Wales Transport Co., Ltd.* [1950] 1 All E.R. 392 (H.L.)). Nor may the owner of the vehicle hide behind the fact that the borrower thereof should have inspected the tyres of the vehicle before he drove it away (*Hickey v. McDonald and another*, 1960 (4) S.A. 451 (F.S.C.) at 455). See also *South British Insurance Co. v. Mkhize*, 1965 (1) S.A. 206 (A.D.). In *R. v. Govender*, 1936 N.P.D. (J/C 586/36), the accused had been convicted of culpable homicide. The facts there were that, while coming round a bend in his lorry, the front left tyre burst and the lorry left the road and capsized in a donga, killing a passenger who was on the lorry at the time. The Crown called an expert mechanic who testified that he had had 28 years' experience in vulcanizing tyres, that the tyre was **badly worn**, and that there had been danger for some time past, probably a month before the accident, that it would suddenly burst. On appeal, the Court confirmed the verdict but altered the sentence.

In *Brasser v. Friedman*, 1942 W.L.D. 21, the view was expressed that the bursting of a tyre of a car generally receives some explanation from the circumstances in which it takes place, which may show whether the driver has been blameworthy or not. As a rule some outside evidence as to the cause can usually be found, as where the tyre was punctured by a nail causing the sudden deflation of the air tube therein (*ibid.*).

See also 'Worn or Defective Tyres' (*post*, p. 348).

(d) SKIDDING

The determination of responsibility for collisions caused by the skidding of a car provides one of the most difficult of all problems to solve, and a close examination of all the facts and circumstances prior to, and during, the event complained of is an absolute *sine qua non* to a just solution of the case.

Before attempting to postulate any rules as a guide for the determination of responsibility in this regard it would be as well to summarize the leading cases on the topic.

Baumann's Selected Products v. Porter, 1934 C.P.D. 383: A skid is not necessarily due to negligence on the part of the driver of a car that has skidded. When conditions are such that skidding is likely, a driver who drives at a fast speed when he is near to or passing other traffic may be guilty of negligence. Even if a driver has not been negligent in getting into a skid, he may nevertheless be liable for damage caused as a result of such skid if he has not taken reasonable and timely action to correct that skid.

In this case it was drizzling and the road was greasy and the driver of the van admitted that he did nothing to correct the skid although he stated that he had had skids before and had turned into them. *Per Gardiner J.P.*:

'Now a skid is not necessarily due to negligence on the part of the driver. On the other hand it is not an Act of God. It may in certain circumstances be due to negligence; in others it may not. The evidence in the present case shows that it is easier to skid on a greasy surface when going quickly. Where therefore the conditions are such that skidding is likely, a driver who proceeds at a fast speed when he is near to, or passing other traffic, may be guilty of negligence. . . . Even if the driver is not responsible for getting into a skid, it is his duty to take action to correct it and thus get the lorry back to its proper direction . . . the driver admitted that he did nothing to correct the skid.'

Brasser v. Friedman, 1942 W.L.D. 21: As a result of a sudden deflation of the right wheel of a motor-car, the car went into a skid and overturned, causing serious injuries to one of the passengers, who sued the driver for damages on the ground that he was negligent in not avoiding the overturning of the car by the exercise of reasonable skill in counteracting the effects of the skid. The Court found that the defendant could not have foreseen the skid and held that the onus was on the plaintiff to prove that the defendant could have avoided the effects of the skid by some means reasonable in the circumstances and that this onus had not been discharged. In this case a large nail had pierced one of the rear tyres and caused an instant deflation. The plaintiff attributed the overturning of the car to the sudden application of the brakes and to the fact that the defendant turned his wheel in the opposite direction to that of the skid, which, he said, were the worst things to do in an emergency of this kind, but the Court ruled that there was insufficient evidence to satisfy it that, even if the defendant had turned into the skid, instead of against it, the overturning of the car would have been avoided.

Shurrie v. R., 1941 T.P.D. (J/C 131/41): Appellant was driving along a road, which was wet, and approaching a bus travelling in the opposite direction. A small car proceeded to overtake the bus and had nearly passed it when appellant's car skidded and crushed the small car against the bus, killing one of the occupants. Appellant stated that she thought the small car was coming too closely to her side of the road and had thereupon applied her brakes strongly so as to give the driver of the small car time to pass the bus and regain his correct side. Held, that she could have continued her course without applying her brakes and that the forceful application of brakes was unjustified in the circumstances and amounted to negligence on her part. *Per Schreiner J.*:

'Even if the road is not obviously greasy, a careful driver will not unnecessarily apply his brakes strongly, because the risk of a skid is always present . . . the stronger the application of brakes the more likely it would be that the car would skid.'

R. v. Mouton, 1942 C.P.D. 553: The appellant, while driving his lorry, the tyres of which had worn smooth, at a speed of 15 m.p.h. on a wet road which he knew was slippery, stated that he saw deceased approaching him on a bicycle and swerving from side to side owing to a strong wind. He took his foot suddenly off the accelerator and as a result the lorry skidded and collided with the cyclist and killed him. Held, that as the appellant knew that the road was slippery, that his tyres were worn, and that the effect of his suddenly taking his foot off the accelerator would be the same as the sudden application of his brakes, his conduct constituted negligence.

R. v. Aucamp, 1959 (2) S.A. 755 (T): Where it was raining at the time, thereby making the road slippery, and after correcting one skid the accused's omnibus again skidded and struck the complainant's car, the Court held that the knowledge which the driver possessed prior to the second skid was such that prudence would have dictated a timely reduction of speed and, accordingly upheld the conviction for driving negligently.

Herbert v. Miller, 1935 P.H., O. 17 (C): Defendant's car struck an embankment at the side of the road and overturned, causing injury to plaintiff, a passenger. Held, that a reasonable deduction from the evidence was that the car skidded on some loose sand in the centre of the road and that the skidding was the real cause of the accident. But the fact that the car skidded was not necessarily proof of negligence. There was loose sand in the middle of the road and had been traversed by the right wheels of the defendant's car. If it had been apparent that it would be dangerous to drive through the sand it would have been defendant's duty to avoid the middle of the road. The evidence negated the supposition that the defendant should have been aware of the danger of this sand. Furthermore, there was no evidence to show that defendant's failure to correct the skid proved that he was negligent.

Dreyer v. National Motors (Pty.) Ltd., 1936 T.P.D. (J/C 442/36): Defendant, driving the car of the plaintiff, skidded on some loose rubble at a bend on a road and damaged the car. Defendant stated that, at the bend, the lights of the car were thrown off the road. He got to the edge of the road, and on to some loose rubble which caused the skid. Held, that under those circumstances a reasonably careful driver would not only drive slowly, but very slowly, and would keep a sufficient distance from the edge of the road where there was rubble which might cause a skid. The road was known to the defendant and he should have taken the utmost care in taking the bend. The defendant should have expected and realized that at any time he might come on to some portion of the road where the surface was loose and should have adjusted his speed accordingly.

Durban C.C. v. Volkenhorn, 1941 N.P.D. (J/C 270/41): After B had negotiated a level crossing his car began to skid and eventually collided with the plaintiff's car. The facts showed that the car skidded twice to the right and once to the left, and the magistrate had found that, although the plaintiff had failed to prove B's negligence in getting into a skid, yet B was negligent in failing to take proper steps to correct the skid. The Appeal Court held that, had he done nothing at all he might have been found at fault, but that in the circumstances of that particular case he had acted as any reasonable man would.

Baigi v. Potgieter, 1939 T.P.D. (J/C 70/39): Defendant was 'free-wheeling' down a decline at a speed of 20–30 m.p.h. When he saw that he was catching up too fast with a lorry in front of him, he applied his brakes. His car skidded violently across the road and collided with the plaintiff's car which was proceeding in the opposite direction. Held, that the defendant was negligent before the skid commenced in that he had delayed the application of his brakes until he was too close to the lorry to apply them safely. Per Schreiner J.:

'Now it seems to me that all skidding cases contain serious difficulties in apportioning blame, because the general proposition has been laid down more than once — and it seems a reasonable one — that skidding by itself is not evidence of negligence. Skidding can take place without negligence; but it requires and generally receives explanation from the circumstances in which it takes place. The plaintiff, where the skidding has affected the vehicle of the defendant, is often in a difficult position because it is not possible, as a rule, for him to fix precisely what the cause of the skid was, and that being so it is often difficult for him to show that the defendant was negligent in any one respect. In such circumstances the defendant may provide an explanation which leaves the evidence in a state of equilibrium, in which case the plaintiff will fail in his action. But if the circumstances lead to the inference that there was negligence in the conduct of the driver of the skidding car before the skid arose, or if after the skid came into existence the indications are that a prudent driver would, by the exercise of reasonable care, have avoided the collision by getting out of the skid or otherwise controlling his vehicle, then, of course, the plaintiff will succeed.' The appeal was dismissed with costs.

R. v. White, 1940 P.H., O. 8 (O): On a straight main country road cars A and B had stopped on opposite sides of the road in order to enable their occupants to converse. The accused passed in between and injured a person standing outside his car in the road. Two cars had successfully passed prior to the accused's arrival. The road between the two stationary cars was badly corrugated, a fact which was well known to the accused who stated that he had been travelling at 40 m.p.h. shortly before the collision and had slowed down to 28 m.p.h. in seeking to pass, but that the corrugations caused his car

to skid. Held, that he should have slowed down below skidding speed before he reached the cars and that he had been negligent in failing to do so.

Hunter v. Wright [1938] 2 All E.R. 621: Defendant was driving a motor-car when it skidded and subsequently mounted the pavement and injured plaintiff who was walking thereon. It was found that the skid was not due to any negligence on the part of the defendant, but was contended that she had been negligent in (a) steering the wrong way to correct the skid, and (b) accelerating after the skid. Shortly before the accident, she had practically stopped at a pedestrian crossing and was accelerating when the skid occurred. The speed of the car was estimated at 16 to 20 m.p.h., and the car travelled 13 to 20 feet between the skid and the pavement. Held, the time and space at the disposal of the defendant in which to remedy the skid were so short that, it being proved that the skid was not due to any fault of hers, she had discharged the onus of showing how the car came to be on the pavement and could not be said to have been in any way to blame for the accident.

Goddard L.J., in dealing with the consequences of the skid said:

'When one says that if she had turned the car one way, she might have done something, or if she had turned the car another way some other consequence might have happened, I think it is reduced to an element of speculation.'

In *Wing v. General Omnibus Co.* [1909] 2 K.B. 652, the plaintiff had obtained judgment for damages in the lower court occasioned, it being averred, by the negligence of the bus company in permitting an omnibus to go on to the road when the conditions were such that skidding was likely. On appeal, however, it was decided that this fact could not be said to constitute negligence and the decision was accordingly reversed. (See p. 698.) This case should be contrasted with *Barnes Urban D.C. v. London General Omnibus Co.* (1908) 73 J.P. 68.

RULES

From a consideration of the above-mentioned cases, it is submitted that it is possible to formulate three main considerations upon which a plaintiff (or the State) may rely in seeking judgment on an issue where damage has been caused as a result of skidding.

(i) *Res ipsa loquitur*?

Skidding by itself is not necessarily negligence (*Herbert v. Miller*, and *Baumann's Selected Products v. Porter*), and the conclusion follows that the plaintiff must establish some specific act of negligence on the part of the defendant, either in getting into the skid or in failing to obviate its effects.

But is the position not thus too widely stated? Can it not be premised that where the plaintiff (or complainant) has been wholly inactive and where the only active person, in the events complained of, was the defendant (or the accused), there is room for the application of the *res ipsa loquitur* rule within the doctrine set forth in *Scott v. St. Katherine Dock Co.* (3 H. & C. 596). If a motor-car is under the defendant's control and damage is caused to the plaintiff which arises from some event which, in the ordinary course, does not happen if the driver takes proper care, some presumption—light, perhaps, but still a presumption—arises that the driver has been guilty of *culpa* (*Baumann's Selected Products v. Porter*, 1934 C.P.D. 383). This contention receives some degree of opposition from the decision in *Wing v. General Omnibus Co.*, but that case, properly interpreted, means that negligence is not to be imputed to the **proprietor** of a vehicle in allowing an omnibus to go out on to the public roads when the conditions were such that skidding was likely. No mention is made in this case as to the responsibility of the **driver** when a skid occurs under such conditions. It seems therefore that, since a skid is not an act of God,

some explanation of the circumstances thereof is required from the defendant (*Baigi v. Potgieter* and *Brasser v. Friedman*). On the other hand where both parties have been active participants in the events giving rise to an action for damages, no such presumption might arise (*post*, p. 496). This view finds support in Mazengarb on *Negligence on the Highway*, p. 44. where he states:

'If a defendant's motor vehicle behaves in an abnormal manner or appears in a situation where it has no right to be, negligence may be inferred against the owner. But if a reasonable explanation, e.g. inevitable accident, appears from the plaintiff's own case or is given by the defendant, the cogency of the fact of the accident by itself disappears and the plaintiff is left as he began with the burden of proving negligence.'

Having established the fact that the damage complained of was due to a skid, the further question arises:

(ii) Was the defendant negligent in getting into the skid?

In this regard the plaintiff may establish his case:

- (a) By showing that the defendant was **aware**, or ought to have been aware of the **dangerous condition of the road** necessitating an increased degree of caution and that such caution was not shown by him, as where the driver's bus had skidded previously a short distance from the second skid, but he had continued his course without decreasing his speed (*R. v. Aucamp*, 1959 (2) S.A. 755 (T)). Conditions of this character would, *inter alia*, be a sandy patch (*Herbert v. Miller*), or loose gravel or rubble (*Dreyer v. National Motors*), or wet and slippery, greasy, or muddy surfaces of the road (*R. v. Mouton*; *Shurrie v. R.*, and *Baigi v. Potgieter*). See also *Hunter v. Wright* [1938] 2 All E.R. 621; *Laurie v. Raglan Bldgs.* [1941] 3 All E.R. 332, where it was held that a failure to have chains on one's wheels on frozen, slippery roads is negligence.
- (b) If the conditions were such that the **brakes should be applied gently** or not at all, the defendant can still be mulcted in damages if it is found that he applied his brakes suddenly or **forcibly** (*Baigi v. Potgieter*; *R. v. Shurrie*), and the position would be no different where the same effect is obtained by the sudden lifting of his accelerator (*R. v. Mouton*).
- (c) An inquiry into the state of the **tyres** of the vehicle which skidded may show that they were worn smooth and therefore liable to skid, a propensity which would be increased if the driver were travelling over wet or slippery roads (*R. v. Mouton*). (See *post*, p. 348.)
- (d) If **corrugations** are blamed by the defendant for causing the skid, it is pertinent to ask whether the driver was **aware** of that fact before the accident, and if so, whether he did not reduce his speed to below skidding speed (*R. v. White*).

(iii) Was the defendant negligent in failing to avoid the effects of the skid?

(a) *Culpa* may be imputed to the defendant by showing that he **failed to turn into the skid**, instead of against it, but the evidence in this respect must be clear and not mere **speculation** (*Durban C.C. v. Volkenhorn*; *Hunter v. Wright*; *Baumann's Selected Products v. Porter*). The courts are

alive to the discomfiture or panic in the mind of the driver upon finding that his car is skidding, and will not be disposed to hold his consequent action too much against him when he acts in this emergency. But, of course, the defendant cannot set up a state of emergency for which he himself was responsible (see *ante*, p. 314). Assuming, however, he was not so responsible, then it becomes important to inquire:

(b) What **time** was there at the disposal of the defendant in which to make the **necessary adjustments** to correct the skid? (*Durban Corp. v. Volkenhorn*). Failure to take any action whatever is blameworthy (*Baumann's Selected Products v. Porter*).

(e) STOPPING

It is axiomatic that to drive into a danger when, by pulling up and stopping, such danger can be avoided, is blameworthy in the highest degree, consequently a driver who sees, or has an opportunity of seeing, that a collision is imminent unless he brings his car to a standstill, and fails to do so, is responsible for the damage that ensues (*Adams v. Clarke*, 13 C.T.R. 407; *Lombard v. Van Eyssen*, 1941 C.P.D. (J/C 261/41), and *R. v. Harrison*, 1927 E.D.L. 262).

Certain legislative provisions have been enacted by the various provincial ordinances in relation to the obligation of the driver to stop—

- (a) at a stop street sign or when ordered to do so by a traffic officer; (sections 101(1) and 115(d) of the ordinances. But in order to justify a conviction there must be *mens rea*, since a person cannot be convicted for failing to obey a signal given by a constable on point duty, if he had reasonably failed to see that signal (*R. v. Barber*, 1963 (3) S.A. 700 (S.R.));
- (b) as close to the left-hand side of the road as possible upon the approach of a fire-engine or ambulance; (sec. 107)
- (c) at the request of any person leading, riding or driving any animal. (sec. 118(b)).

In regard to the statutory duty to stop after a collision it has been held that there is no such duty if the only damage is to one's own vehicle (*R. v. Storey*, 1954 (2) P.H., O. 13 (S.R.); *R. v. Neethling*, 1965 (2) S.A. 165 (O)). Nor can the accused be found guilty of the relevant section if he proves that he was **unaware** that he has knocked down and injured another person (*R. v. Ntshabaleng*, 1956 (4) S.A. 799 (T); *R. v. Tazwipesa*, 1966 (3) S.A. 695 (R); *R. v. Breingan* 1966 (3) S.A. 410 (R., A.D.); *Hadding v. Price* [1948] 1 All E.R. 283 (K.B.)); but the onus of proof is upon him in this regard (section 135 (4)). The charge must allege that the damage was due to the presence of another vehicle on the road at the time (*R. v. Yusuf*, 1952 (4) S.A. 276 (N)). The obligation to stop and render assistance to the injured person applies even if that person is killed instantly (*R. v. Siqono*, 1949 (2) P.H., O. 43 (A.D.)).

7. SPEED

(a) EXCESSIVE SPEED

Generally speaking, a driver should so regulate the speed of his vehicle as to be able to draw up in time to avert a collision with any other vehicle or person who may be on the road at the time (*R. v. Sprenger*, 1920 E.D.L.;

R. v. Beck, 1937 P.H., O. 25 (C), and *Adams v. Clarke (supra)*). Whether speed is unreasonable or not will always depend on the particular circumstances of the case (*R. v. Freeman*, 1931 N.P.D. 460), and the locality (*R. v. Kramer*, 1937 P.H., O. 9 (T); *R. v. Van der Merwe*, 1943 C.P.D. 25). A speed of 40 m.p.h. on an open country road may be perfectly normal; on the other hand a speed of, say, 15 m.p.h. in a town when visibility is bad may be excessive (*Thornton v. Fisser*, 1928 A.D. 398). Per Solomon C.J.:

'The question of whether speed is excessive is one which is **relative to the special circumstances** of the case. On an open road, with no one in sight, and no possible danger of anyone being injured, a speed far in excess of 45 miles per hour is not necessarily excessive, while, on the other hand, to drive in a thick fog at, say, 10 miles per hour might well be regarded as excessive. It is **the duty of the motorist to regulate his speed so that he can pull up within the range of his visibility.**'

Speed, then, is a general particular of negligence which is to be considered in the light of (a) visibility, (b) locality, (c) time, (d) climatic conditions, and (e) the quantum of traffic on the road at the time or likely to be found thereon. In regard to look-out it has been said 'the faster the speed the greater need there is for watching the road ahead' (*R. v. Apter*, 1941 O.P.D. (J/C 88/41)), or, as was said in *Rawles v. Barnard*, 1936 C.P.D. 74, 'the higher the speed the greater the caution required'. But mere speed in itself is not *ipso jure* proof of negligence (*S. v. Gerrand*, 1968 (2) P.H., O. 28 (E)). In this case the only evidence was that the accused had driven at a speed of 60 m.p.h. which exceeded the speed limit in a street of unstated width on the outskirts of a town.

The inference that the driver was travelling at an excessive speed may be drawn from the circumstances of the particular case (*Heneke v. Royal Insurance Co.*, 1954 (4) S.A. 606 (A.D.) at 613; *R. v. Zonduyizwa*, 1938 P.H., O. 12 (N)).

Reducing speed—duty: It is essential that the driver of a leading vehicle in a flow of traffic, intending to slow down, should ensure that the condition of the traffic permits him to do so. He must select an opportune moment for so doing and carry out the manoeuvre in a reasonable manner and should give timeous warning by signalling his intention to do so (*Keuning N.O. v. London & Scottish Assurance Co., Ltd.*, 1963 (3) S.A. 609 (D) at 612). This is always assuming he has time to do so, for the rule would not apply where the driver has been placed in a position of emergency by the unexpected stoppage of the vehicle ahead of him, involving him and often the vehicles following him, in what in common parlance is termed a 'concertina crash'.

Cases

In the following cases the driver was found to have been travelling at an **excessive speed** in the particular circumstances:

Where the accused had driven at 53 m.p.h. through a street the width of which had been greatly reduced owing to certain excavations being made thereon, and past some sixty Natives working there (*R. v. Brick*, 1938 E.D.L. 71).

Where a person had approached a main road from a side road at a very moderate speed and had collided with another travelling on the main road at 40 m.p.h., the Court held, on these grounds, that the person in the main road was negligent (*R. v. Haupt*, 1931 C.P.D. 267).

Where, though the plaintiff had turned, at a slow pace, from a side street into a main street on his wrong side, thereby cutting the corner, yet the speed of the defendant was such that he was unable to slow down and had therefore incapacitated himself from avoiding the consequences of the plaintiff's negligence in making a bad turn (*Schoeman v. Schoombee*, 1936 E.D.L. 91. See, also, *R. v. Pienaar*, 1935 P.H., O. 16 (C)).

Where the accused was travelling at about 50 m.p.h. and was therefore unable to see the signal of a man standing on the side of the road or the position of traffic thereon as a consequence of which he collided with a car parked at the side of the road (*R. v. Sabaan*, 1931 E.D.L. 342).

Where the defendant had travelled at high speed round a bend in a road, the surface of which, to his knowledge, was made up of loose rubble, and thereupon capsized, causing injury to the plaintiff, a passenger in the accused's car, the Court held that the plaintiff was entitled to damages (*Dreyer v. National Motors*, 1936 T.P.D. (J/C 442/36)).

Where the accused, on the passengers' becoming nervous and exhorting him to go slower, reduced his speed but nevertheless had an accident (*R. v. Van Wyk*, 1936 P.H., O. 7 (C)).

In *R. v. Harrison*, 1927 E.D.L. 262, the accused was travelling on his correct side of the road at 30 to 40 m.p.h. The complainant, when accused was about 100 yards away, commenced to enter the street, in which accused was, and when the latter was 50 yards away, signalled to the accused (who hooted in answer) that he was about to cross the road, and then whipped up his horse, drawing his laden wagon, but before he could cross the street a collision occurred. Here the Court held that the accused, in travelling at 35 m.p.h. and taking no reasonable precautions to avoid colliding with complainant's wagon by not slackening his speed, which was the proximate and effective cause of the collision, had rightly been convicted.

Where defendant approached a crossing at an excessive speed and it was found that, had he travelled at a normal speed, he could have avoided the plaintiff (*Pierce v. Hau Mon*, 1944 A.D. at 192).

In *R. v. Nielson*, 1937 T.P.D. (J/C 36/37), the facts were that the accused had travelled at 56 miles an hour down Roberts Avenue, Johannesburg (a road about 16 to 20 yards wide), passing five motor vehicles and eight side streets, which were not stop streets, and had blind corners to them. Here Tindall J. held that he ought to have expected that, at any time, traffic might emerge from one of these side streets and that to travel at that rate of 26 yards per second in the middle of the day in a populous centre like Johannesburg was driving at a speed dangerous to the public in terms of section 31(1)(c) of Ord. 17 of 1931.

In the following cases the driver was held **not** to have been travelling at an excessive or dangerous speed:

Where the accused travelled at a high speed down Jules Street, Johannesburg, past sixteen intersections, but the evidence failed to show that any traffic was endangered (*R. v. Davis*, 1936 T.P.D. (J/C 678/36)). In this case the traffic inspector had said that the approaching traffic had to give way. Per Pittman J.:

'The fact that traffic travelling in the opposite direction gave way for the appellant may have been an example of ordinary road courtesy which was not indicative of any potential danger to the traffic in question. In cases of this sort it must be borne in mind that it is not for the traffic inspector merely to state his **opinion** that traffic was actually or might have been in danger; he has to show facts which make that a necessary inference.'

See also *R. v. De Kock*, 1918 E.D.L. 221.

In *R. v. Sassen* (T.P.D. 2.5.1936), on the same charge and in the same place, the conviction of the accused was confirmed. On the other hand, where the accused is charged with driving at a speed which is dangerous to the public it is not necessary to prove which particular member of the public was in danger (*R. v. Cohen*, 1926 T.P.D. (J/C 395/26), and *R. v. Du Toit*, 1922 C.P.D. 461).

The accused drove his car at 40 m.p.h. through a village. There were no pedestrians in the street at the time and no vehicles in motion, though there were some stationary vehicles and also pedestrians on the side-walk. The street was 62 feet wide. Held, that

where the driver has his car under such control that, if a pedestrian or a child or a vehicle were to move unexpectedly into the path of the motor-car in any ordinary manner he would not hit that child or vehicle then, whatever speed he was going at is not dangerous to the public (*R. v. Scott*, 1936 C.P.D. 374).

(b) SPEED LIMIT

The fact that the driver is exceeding the speed limit prescribed by a Provincial Ordinance or by the local authority for the area in question is not necessarily proof of negligence although the statutory regulation certainly provides a guide to the court in arriving at a conclusion whether he had, in the circumstances, been guilty of *culpa* (*Rawles v. Barnard*, 1936 C.P.D. 74) (dissenting from the statement by Fisher J. in *Good v. Posner*, 1934 O.P.D. 90, and *R. v. Freeman*, 1931 N.P.D. 460). (See *post*, p. 505.)

(c) EVIDENCE OF SPEED

Opinions

The evidence of persons estimating the speed at which a vehicle is travelling is not evidence of opinion, but evidence of observation, even though it involves a certain amount of inference from facts. As such it is admissible (*R. v. Van der Westhuizen*, 1929 C.P.D. 484, and *R. v. Frankel*, 1940 T.P.D. 159). But the courts will be careful in accepting such testimony and will only do so after some prior inquiry into the competency and capability of the witness for estimating speeds has been made, and will guard against relying on evidence which, in reality, may be mere guesswork, 'for in few things are greater mistakes made than in judging rates of speed'. (See *R. v. De Kock*, 1918 E.D.L. 221; *Coetzee v. Van Rensburg*, 1954 (4) S.A. 616 (A.D.)), where Schreiner J.A. said:

'Bearing in mind how difficult it is for even honest witnesses to estimate speeds, distances and relative positions with reasonable accuracy, the courts rightly attach importance to traffic marks and similarly substantially unchallenged evidence.'

It is, moreover, very difficult for a person to estimate the speed of a vehicle which is **approaching** him (*R. v. Freeman*, 1931 N.P.D. 460), and the same *ratio decidendi* would apply where the vehicle, having already passed him, is travelling **away** from him. Per Schreiner J.A. in *Hoffman v. S.A.R. & H.*, 1955 (4) S.A. 476 (A.D.):

'So too I do not think that the plaintiff's estimates of speeds at which he was travelling at particular stages as he approached the scene are to be treated as if they are proved to be precise and trustworthy calculations. They are no more than approximate estimates made by a man who had not been expecting an accident and who had no reason to make exact observations as to speed and distances.'

The driver's estimate of speed was also the subject of criticism by Van den Heever J.A. in *Heneke v. Royal Insurance Co., Ltd.*, 1954 (4) S.A. 606 (A.D.) at 612:

'On a long open road one sometimes has the impression of crawling at 40 m.p.h., and if enveloped in a fog and the windows and windscreen are misted over, I do not think one can judge speed with any approach to accuracy.'

Speed limit—watches

On charges of exceeding the speed limit a stop-watch is *prima facie* evidence of its **accuracy**, provided some witness testifies on oath why, in

his opinion, he thinks it is correct, i.e. having had it **tested** in comparison with a chronometer (*R. v. Veale*, 1929 T.P.D. 447, applying *R. v. Matthews*, 1921 T.P.D. 442; *R. v. O'Linn*, 1960 (1) S.A. 545 (N); *S. v. De Jongh*, 1965 (2) S.A. 589 (T) at 592).

In *R. v. Epstein*, 1941 P.H., O. 23 (T), the Court held that the evidence of one traffic constable that the watches had been tested by a certain firm of watchmakers, before and after the trap, was hearsay evidence and that the appeal should be allowed; this decision was followed in *R. v. Kruger*, 1957 (2) S.A. 354 (C).

In *R. v. Jooste*, 1939 T.P.D. (J/C 240/39), it was ruled that, in the *absence of any challenge*, it is not necessary for the Crown to call expert evidence in every case in order to prove that the stop-watches used were accurate (see also *R. v. De Jongh (supra)* at 594).

In trapping cases there must also be good evidence that the *distances* alleged to have been travelled and over which his vehicle was timed, have been correctly and accurately measured (*R. v. Reilly*, 1929 C.P.D. 156; *Khan v. Durban Corporation*, 1945 N.P.D. 316; *R. v. Van Coppenhagen*, 1949 (4) S.A. 205 (T)). A failure to adduce such proof will be fatal to a conviction (*ibid.*).

Number of witnesses

Where an Ordinance provides that no person shall be convicted on the evidence as to the rate of speed of one person only, or upon evidence not supported by measurements as to time and distance, it was held that the requirements of the section are complied with where one witness gives evidence as to the rate of speed and another witness has taken measurements of time and distance (*R. v. Crouch*, 1917 T.P.D. 56). In *Natal* a more stringent view was taken in the decision in *Wallace v. Inspector of Police*, 1931 N.P.D. 282, wherein it was decided that where two stop-watches are used it is not competent to convict on the evidence of the two constables which, only when taken together, enables the calculation of speed to be arrived at. This decision was reviewed, however, in *Khan v. Durban Corporation*, 1945 N.P.D. (J/C 119/45), where Hathorn J.P. pointed out that *Wallace's* case expressly stated that, in such case, the position would be different if one of the police officers had also given independent evidence that the car, in his opinion, had travelled at a speed exceeding the speed limit. In *Khan's* case, therefore, where there was such additional evidence on record, the appeal was dismissed. Even where the accused pleads guilty, the offence of exceeding the speed limit must be established by good, and not hearsay evidence. Accordingly both police officers must be called (*S. v. Wedge*, 1969 (1) P.H., H. (S.) 31 (N)). In this case it was held that, as only one witness testified as to the differences between the two stop-watches, the appeal should be allowed.

Where two stop-watches are used to measure speed, the holder of each watch must give evidence (*R. v. Von Willigh*, 1949 P.H., H. 30 (S.R.)). The position is the same in Rhodesia, where the rule is that there must be at least two witnesses as to speed (*R. v. Hickey*, 1963 (3) S.A. 96 (S.R.) at 99). See also *R. v. O'Lynn*, 1960 (1) S.A. 545 (N). The proper way is for the nearest trap to press the starter of his stop-watch and give a signal at the instant the motor vehicle passes him, and for the furthestmost trap to

start his watch as soon as he sees the signal from the first trap. When the motor-car passes the second trap he must instantly stop his watch and simultaneously give the signal for the first speed trap to stop his watch. A comparison of the two watches is then made. The one is checked by the other, as in all athletic contests. This is the only sure method of proving an infringement of the speeding regulations, and the only method of reducing the element of human fallibility in timing to within reasonable limits. The practice of both traps starting their watches as soon as the vehicle passes each and then stopping them instantaneously at a later stage, leaves far too much room for the element of human error and is no check at all of one upon the other (cf. *R. v. Crouch and others*, 1917 T.P.D. 56; *Wallace v. Inspector of Police*, 1931 N.P.D. 282; *R. v. Frankel*, 1940 T.P.D. 159).

Speed traps—warning of

It has been held that it is a criminal offence for one driver to give another driver any warning that there are speed traps ahead (*R. v. Robertson*, 1952 (3) S.A. 291 (T)). The acceptability of this decision is doubtful, having regard to the contrary views in *Bastable v. Little* [1907] 1 K.B. 59, and *Betts v. Stevens* [1910] 1 K.B. 1, for the reasons set out by the author in (1953) 70 S.A.L.J. 18.

Speedometer

It was at one time held that the speedometer affixed to a vehicle was sufficient prima facie evidence (*R. v. Bakos*, 1936 T.P.D. (J/C 453/36), but considerable doubt has been thrown on this form of evidence by Beadle C.J. in *R. v. Hickey (supra)* at 99, where he said that such speedometers have, not infrequently, been found to have been incorrect, and consequently the court can take judicial notice of the fact that its reading may be out by a certain percentage. See also *R. v. Mantell*, 1959 (1) S.A. 771 (C). In this case the decision in *Nicholas v. Penny* [1950] 2 K.B. 466 was criticized and not followed and the decision in *Melhuish v. Morris* [1938] 4 All E.R. 98 (K.B.) was followed.

In criminal cases, therefore, there must be technical evidence as to the accuracy and reliability of the speedometer (*R. v. Margolis*, 1964 (4) S.A. 579 (T); *R. v. Fischer*, 1938 (2) P.H., O. 44). In *Hickey's* case (*supra*) the conviction was, however, upheld since the appellant had, at his trial failed to give any evidence to contradict the prima facie case against him.

See also *R. v. X*, 1938 O.P.D. 155, and *R. v. Fisher*, 1938 O.P.D. (J/C 250/38).

Gatsometers, RADAR and PETA

More recently resort has been had by the police to trap speeding motorists, the various devices being termed Gatsometer, or RADAR, or PETA, but here again, if the accuracy of the instrument is challenged by the defence, the State must prove the effectiveness and reliability thereof by convincing evidence (*S. v. Dawson*, 1966 (1) S.A. 259 (N) at 263; *S. v. Currin*, 1961 (4) S.A. 393 (O); *S. v. Margolis*, 1964 (4) S.A. 579 (T); *R. v. Peche*, 1967 R.L.R. 261 (R.A.D.); *S. v. Du Plessis*, 1966 (1) S.A. 607 (C); *S. v. Pieterse*, 1968 (4) S.A. 585 (T); *S. v. Lucas*, 1968 (2) S.A. 592

(E)). Even where the accused pleads guilty, evidence is necessary as to the accuracy of the instrument employed unless, of course, he admits its accuracy (*S. v. Israel*, 1966 (1) S.A. 610 (C)). The matter finally came up for decision in Rhodesia in *R. v. Harvey*, 1969 P.H., H. (S.) 51 (R.A.D.) where Beadle C.J. held that . . . Despite the fact that North American courts had taken judicial notice of the accuracy of electronic speed recording devices, the courts in this country would not yet do so and would in each case demand technical evidence which would satisfy them that the instrument was functioning correctly at the time of the trapping'.

The evidence required would be as follows:

- (i) that the instrument has been serviced every 100 hours of use;
- (ii) that the battery was tested with a reliable battery tester within a matter of hours before and after 'trapping';
- (iii) that the power connection was properly connected and the instrument was allowed to warm up for at least 15 minutes before trapping commenced;
- (iv) that the instrument was correctly set up at an angle of 90 degrees to the road, this angle to be obtained by a reasonably accurate method;
- (v) that the road was straight from the point where the instrument's beam crosses the road;
- (vi) that within a matter of hours before and after 'trapping', a police vehicle with a properly tested speedometer was driven through the beam at speeds of 30, 45 and 60 miles an hour and the speeds recorded on the instrument did not differ from those recorded on the car's speedometer by more than 4 per cent;
- (vii) that the built-in 'tester' was operated within hours before and after 'trapping' and the instrument readings did not vary by more than 4 per cent from 40 and 70 miles an hour respectively;
- (viii) that two persons read the meter when the 'trapped' vehicle passed through the beam and observed that there was no other vehicle in the 'trap' at the time;
- (ix) that in the opinion of an expert technician familiar with the working of PETA no casual outside interference such as thunderstorms, other radar beams, or other moving objects passing through the beam could have caused the particular reading to be inaccurate while other readings of speeds taken at about the same time might have been perfectly accurate.

On this evidence the Court would be justified in accepting that PETA's reading was accurate to within 4 per cent with the important proviso that if the accused person gave creditable evidence on oath that he was not travelling at the speed recorded, his evidence should not be neglected in favour of the machine.

Per Beadle C.J.:

'No matter how reliable and acceptable the evidence of the recordings of a scientific instrument may be considered to be, it must never be accepted that such instruments are absolutely foolproof and that their readings must always be accepted in preference to the human word. There is no presumption that such instruments can never lie. Their evidence is no more sacrosanct than that of any other evidence. If an accused person elects to go into the witness-box and gives evidence on oath that despite what PETA recorded his speed as being, he was not travelling at such a

speed—if, for example, he says that he was looking at the speedometer of his car at the time and has led evidence to show that his speedometer was accurate—then the court should not reject his evidence simply because it conflicts with the evidence of the reading registered by PETA. Before such evidence can be rejected the court must be abundantly satisfied that the accused is not telling the truth; it is not entitled to assume that he is not telling the truth simply because what he says and what PETA says do not coincide and because there may be no logical explanation why, in the particular instance, PETA should be wrong. In such cases the evidence of the human word must prevail.'

In regard to the estimation of the speed of a vehicle the stopping distances, illustrated in Schedule 'A' (p. 515) and the time, speed and distance tables in Schedule 'B' may be of great assistance provided the limitations reflected in the judgment of *Bezuidenhout v. Berman* (quoted *ante*, p. 326 hereof) are observed.

Arithmetical arguments

Where relative speeds are only vaguely proved by opinion evidence, and where the relative distances between vehicles or places are also deposed to by estimates drawn from fleeting impressions gathered while in an emotional state when events are hurtling to a climax, it is axiomatic that very little reliance can be placed on arguments seeking to draw conclusions based on such tenuous grounds. See *Dickinson v. Galante*, 1949 (3) S.A. (S.R.) at 1044, where Thomas J. said that argument based on such uncertain data must depend to a great extent on speculation and surmise and that any deductions sought to be drawn from such uncertain premises must, in the nature of things, be inexact and inaccurate.

Speed Limits and Exemptions

The general speed limit, unless there is a traffic sign to the contrary, is, in urban areas, 35 miles per hour and, outside such urban areas, 70 miles per hour (sections 102 and 103 of the Ordinances). In this regard it has been held that where the accused motorist could not reasonably have been aware that he was travelling in an urban area, with a 35 miles per hour speed limit, his conviction for speeding should be set aside (*S. v. Duvenhage*, 1968 (2) S.A. 614 (T)).

In such urban areas privileged vehicles, such as fire-engines, ambulances, and police vehicles are authorized to exceed the speed limit, prescribed by the traffic sign, provided a distinctive sounding device, such as a siren or bell, is constantly sounded while the vehicle is in motion. The question arises, in this connection, as to what the position would be in the event of there being **no traffic sign**. It would seem that section 180, which binds the State, would apply, unless the Administrator has by notice in the *Government Gazette*, exempted the driver/vehicle in question from the operation of the ordinance, and, accordingly, the general speed limits, indicated above, would have to be observed. In any case, the driver of such privileged vehicle would still have to observe some reasonable degree of caution at intersections. (See *post*, pp. 367 and 377.)

8. FREE-WHEELING

It is within the knowledge of most experienced motorists that one has less control over the actions of one's car when one is travelling down-hill on free wheel. Where, therefore, defendant was travelling down-hill at not

less than 35 m.p.h. in free wheel—so that the engine had no braking efficiency whatever—and collided with another car coming from a side street at 10 m.p.h., it was decided that, as the defendant had seen this car approaching at a distance of 50 yards away, he had been guilty of negligence (*Wolfaard v. Martindale*, 1940 A.D. 235).

9. WIDTH OF VEHICLE AND LOAD

A greater degree of caution would appear to be expected of a driver of a vehicle or lorry, when the load he is carrying, or drawing, is abnormal in that it extends beyond the usual width of the vehicle. Forgetfulness of this fact on his part may involve him in liability for damage or injury caused as a result. In *Cramer v. S.A.R. & H.*, 1942 P.H., O. 5 (C), it was decided that to draw, at night-time, a trailer loaded with a huge packing-case, 18 feet wide and which projected $4\frac{1}{2}$ feet over the centre of the road, was negligence unless there is a car accompanying the tractor warning the public of its approach. In this case the plaintiff was following G, who, on seeing the trailer, pulled up to the left and stopped. Plaintiff passed G and collided with the packing-case and the Court ruled that the defendant should not have placed him in this emergency, and awarded damages accordingly.

In *R. v. Williams*, 1943 E.D.L. 228, the accused was driving a vehicle with a trailer which was somewhat wider than usual, having stanchions attached which made it 5 inches wider. In manoeuvring his vehicle he forgot the extra width and one of the stanchions struck a vehicle he was passing, causing it to move and crush a Native who was between it and another vehicle, causing his death. Held, the accused had rightly been convicted of culpable homicide. (See also *post*, p. 387.)

Where accused was driving a lorry with a plank protruding from the side of the lorry, the Court held that he was driving in a negligent manner in passing a pedestrian who was injured by the plank (*R. v. Olivier*, 1947 (1) A.S.A.R. 345). (See also *Oosthuizen v. Webb*, 1947 (2) S.A. 670). See also section 93 of the regulations in respect of the limits of the 'overhang' and section 96 in regard to the obligation to have a light during night-time, and a flag of red cloth during daylight, affixed to the extreme end of an overhanging load.

10. WORN TYRES

The motor vehicle owner's duty is to see that his vehicle is not in such a state of disrepair as to constitute a danger to other road-users and this includes a duty to inspect his tyres in order to see that they are not so defective as to be likely to burst and/or cause damage to other road-users (*Donald v. Berman*, 1960 (1) S.A. 361 (S.R.); *Barkway v. South Wales Transport* [1950] 1 All E.R. 392 (H.L.)). A reasonably prudent man does not, therefore, continue to use a tyre until there are unmistakable signs that a fracture is both imminent or inevitable. He should discard a tyre as soon as it appears to him, for whatever reason, that there is a real and substantial risk of a fracture occurring, having regard to the contemplated further use thereof. If the owner of a car, or his servants, neglects the duty of **regular examination** of tyres, or fails to heed a warning which the external appearances of the tyre clearly conveys, he would be guilty of

negligence if as a result damage is caused to another (*South British Insurance Co., Ltd. v. Mkhize*, 1965 (1) S.A. 206 (A.D.)). See also *Hickey v. Donald and another*, 1960 (4) S.A. 451 (F.S.C.) at 454. This basis of *culpa* is to be found, not in the mere fact that a tyre has burst because of a defect, but that the defendant has failed to take reasonable steps to ensure that it was in good order and condition (*Barkway v. South Wales Transport (supra)*).

In order to evade liability, in this regard, for a failure by an insuree to maintain his vehicle in an 'efficient condition', the insurance company must satisfy the court that the insuree failed to conform to the minimum standard of skid resistance (*Auto Protection Insurance Co. v. Hammer-Strudwick*, 1964 (1) S.A. 349 (A.D.) at 335, 360). In *R. v. Mouton*, 1942 C.P.D. 553, it was found that one of the main features of the accused's negligence was the fact that he had proceeded out on to a public road which was wet, knowing that his lorry was provided with tyres which had worn smooth. Having regard to this fact he should have anticipated a skid when he lifted his accelerator when approaching a cyclist, and, not having made allowances for this fact, he was held to have been rightly convicted of culpable homicide. See also *Ferber v. Caledon Insurance Co.*, 1953 (2) P.H., O. 24 (C).

Section 85(f) of the regulations under the provincial ordinances provides that it is an offence to have a tyre the rubber covering of which is so worn or damaged as to expose the fabric or cord of the tyre. In regard to the condition of the driver's tyres being so worn or smooth as to be ineffective in enabling him to stop his vehicle within the prescribed distance, after applying his brakes, see *S. v. Govender*, 1968 (3) S.A. 14 (N) at 19-20. Here it was ruled that it is not sufficient for the State witness merely to state that the tyres were 'defective' but that he should state why, in his opinion, they were inadequate.

11. WHEN TOWING ANOTHER VEHICLE

Section 114 of the provincial ordinances provides that:

'No person shall drive upon a public road any vehicle towing another vehicle—

- (a) unless the tow-rope or chain or other connecting appliance is so adjusted that the distance separating the two vehicles does not exceed twelve feet; or
- (b) unless the vehicle which is being towed is securely attached to the towing vehicle and is under proper control; or
- (c) unless, except in the case of a trailer, the means of connection between the two vehicles has been rendered easily discernible by other users of such public road by day or by night; or
- (d) unless there is a person in control of the steering apparatus of the vehicle which is being towed in the case of a motor vehicle towing another motor vehicle other than a trailer, and such person holds a driver's licence relating to the class of vehicle which is being towed; provided that the provisions of this paragraph shall not apply when a vehicle is so towed that its steerable wheel or wheels is or are carried clear of the ground or is connected to the towing vehicle by a steering lock tow-bar; or
- (e) unless the connecting appliance is a tow-bar, at a speed in excess of the rate of twenty miles per hour in the case of a motor vehicle towing another motor vehicle other than a trailer; or
- (f) if the towed vehicle is conveying passengers, except where such towed vehicle is a semi-trailer; provided that a tractor not designed for nor capable of

exceeding a speed of twenty miles per hour on a reasonably good level road, may draw one trailer conveying passengers otherwise than for hire or reward and such conveyance is not prohibited in terms of any other provision of this Ordinance; or

- (g) if the towed vehicle is a motor vehicle without efficient brakes, unless the connecting appliance is a tow-bar.'

12. LEAVING VEHICLE UNATTENDED

Section 119(1)(f) of the provincial ordinances makes it an offence to allow a motor vehicle to remain unattended on a public road without so setting the brake, or adopting such other method, as will effectively prevent the vehicle from moving from the position in which it is left, while section 119(1)(l) stipulates that no person shall cause or allow a motor vehicle to remain stationary and unattended while the engine is running.

13. WHILE REFUELLING

Section 119(1)(n) of the provincial ordinances provides that a person, having a motor vehicle on a public road, shall not cause or allow the engine thereof to run while petrol or other inflammable fuel is being delivered into the fuel-tank of such vehicle, or to cause or allow such engine to be started before the delivery of the petrol or other inflammable liquid into the petrol-tank has been completed and the cover of such fuel-tank has been replaced.

14. LOAD

Under section 106(c) of the provincial regulations, it is provided that no person shall operate a motor vehicle carrying any goods which are not safely contained within the body of the vehicle and securely fastened to the vehicle. In *S. v. Tsotsetse*, 1969 (1) S.A. 295 (T), it was ruled that this regulation was applicable to the case of a person carrying a load of wet sand which escaped from the body of the vehicle in such a manner that it sprayed up behind the vehicle thereby rendering the road slippery and causing wet sand to get into the eyes of a travelling traffic inspector. It is probable that, should non-observance of the statutory regulation be the cause of an accident or injury to another road-user, he would have good grounds for action against the culprit.

CHAPTER XVII

PLACES AND LOCALITIES

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1. PUBLIC ROAD DEFINED

The obligations of the driver of a motor vehicle, in so far as offences relating to careless driving and other duties are concerned, are confined to places on a 'public road'. This term is defined in section 1 of the various Ordinances as meaning 'any road, street or thoroughfare which is commonly used by the public, or section thereof, or to which the public, or section thereof, have a right of access and includes (a) the verge of any such road, street or thoroughfare; (b) any bridge, ferry, ford or drift traversed thereby; and (c) any other work or thing forming part of, or connected with or belonging to, such road, street or thoroughfare'. In *Prokureur-Generaal (Transvaal) v. Kriel*, 1968 (2) P.H., O. 47 (T), it was held, dissenting from the ruling in *S. v. Christodoulou*, 1967 (3) S.A. 269 (N) at 278-83, that the meaning of the word 'commonly' in the definition is the same as 'without more', that is without anyone having to ask permission or without having to do business with the owner, or without having any right to visit anyone there. In *Christodoulou's* case Harcourt J. and Kennedy J. (Van Heerden J. dissenting) ruled that a private parking area was not part of a public road since a person who comes on to premises *invitio domino* cannot be regarded as having a 'right of access' within the meaning of the statutory definition, but the Court in *Kriel's* case considered that the words of the lawgiver contains two separate definitions, i.e. (a) 'which is commonly used by the public' and (b) and 'to which the public have a right of access', and that, consequently, since the premises of the S.A. Iron and Steel Corporation was a place commonly used by the public, or a section thereof, it fell within the definition of a public road.

It is submitted that both the aforementioned decisions were, on the facts of their own particular cases, correct, since it is a moot point whether caravaners as such can competently be regarded as a permanent 'section of the public' or that a private parking place is one 'commonly used' by any such section and, this being so, a penal statute should, in the case of an obscure or ambiguous concept or definition, be strictly construed, i.e. rather in favour of the accused than as against him (see *R. v. Abel*, 1948 (1) S.A. 654 (A.D.) at 662, and *London Passenger Transport Board v. Moscrop* [1942] 1 All E.R. 97 (H.L.) at 102).

In this regard it should be noted that section 150 of the Ordinances provides that the place in question shall be presumed to be a public road until the contrary is proved. In delict, it is immaterial whether the road is a public or a private one.

2. CORRECT SIDE OF THE ROAD

The various Motor Vehicle Ordinances have injunctions to keep on the left-hand side of the road, and make it a criminal offence not to drive on the left side of the roadway and not to encroach on the right half of the roadway unless (a) this can be done without obstructing or endangering other traffic or property which may be on the roadway and is not prohibited by a road traffic sign or (b) in compliance with a direction of a police officer (section 107). Accordingly it is not necessarily negligence for a driver to go over the continuous white line when overtaking another vehicle in the absence of evidence showing that it was dangerous to the public for him to do so (*R. v. Mtemba*, 1957 (1) P.H., O. 13 (T)).

In the leading case of *Klompas N.O. v. Potgieter*, 1912 T.P.D. 863, Wessels J. is reported to have said:

'It is the rule of the road that you must keep to the left and must pass a person approaching you in that way. But there is no obligation on a person who is riding or driving along a road to ride through all the ruts and other inequalities on the left of the road. He is quite at liberty to avoid such obstacles. If he can find a better part of the road he is entitled to ride on that part of the road, especially when riding or driving in the country. But then he must use more care than when he is on his own side of the road. If there is a vehicle in the way, and he wishes to pass it, then, whether on his left is ruddy or not, he must keep to his left. The law with regard to this is laid down in two old and very well-known cases. In *Puckwell v. Wilson*, 5 Carr & P. 375, and *Chaplin v. Hawes*, 3 Carr & P. 554, the law is stated as follows: "Though the rule of the road is not to be adhered to, if by departing from it an injury can be avoided, yet in cases where parties meet on the sudden, and an injury results, the party on the wrong side should be held answerable, unless it appears clearly that the party on the right had ample means and opportunity to avoid it." These two cases embody the principles which apply to nearly all so-called running-down cases.'

There have been a number of subsequent decisions, in regard to driving on the correct, or incorrect side of the road, namely *Morley v. Wicks*, 1925 W.L.D. 13; *Montgomery v. Hulston*, 1917 A.D. 187; *Thurman v. Eales*, 1925 E.D.L. 36 at 45; *Solomon v. Musset and Bright*, 1926 A.D. 427; *Steenkamp v. Steyn*, 1944 A.D. 536 at 554; *Minister of Defence v. African Guarantee and Ind. Co.*, 1943 A.D. 141; *East London Municipality v. Van Zyl*, 1959 (2) S.A. 515 (E) at 518; *Olivier v. Botha*, 1960 (1) S.A. 678 (O) at 682 (*R. v. Bredell*, 1960 (3) S.A. 558 (A.D.)), and *S. v. Mathiba*, 1963 (2) S.A. 121 (T) at 123, which may be summarized as follows:

- (a) Although it may be a criminal offence under the by-laws or regulations, not to drive on the left-hand side of the road, it is not necessarily negligence, i.e. 'careless driving', to drive on the right-hand side.
- (b) A person may drive on the right-hand side provided he takes extra care, keeps a sharper look-out and does not interfere with the progress of, or endanger, other vehicles or pedestrians. He may have been forced to do so in the case of an emergency. (See *post*, pp. 354-5.)
- (c) If a person does have a collision while on the incorrect side of his road, such fact is *prima facie* evidence of negligence calling for an explanation on his part.
- (d) To go on the wrong side of the road, around a blind corner, can amount to recklessness justifying a sentence of imprisonment if another person is killed as a consequence.

THE PRESUMPTION

It follows that, while it is not negligence *per se* for a person to drive on his incorrect side of the road, and the driver may be entitled to do so if forced thereon or if it is quite safe to do so, yet, if damages is caused to some other person, vehicle or animal, then a presumption arises that he was guilty of negligence and that that negligence was the cause of the collision (*Bredell v. Bosman*, 1932 C.P.D. 131; *Rose v. Madden*, 1913 T.P.D. 82; *Mizen v. Ries*, 1914 E.D.L. 511; *Webber v. Solomon's Motors*, 1937 E.D.L. 299; *Khan v. Texas Co. of S.A., Ltd.*, 1942 C.P.D. 213; *Klompas N.O. v. Potgieter*, 1912 T.P.D. 863; *Dusting v. Pretoria Municipality*, 1963 (2) S.A. 121 (T) at 123).

pality, 1916 T.P.D. 498; *Dowling v. Pretoria Municipality*, 1927 T.P.D. 233; *R. v. De Swardt*, 1949 (1) S.A. 516 (N); *East London Municipality v. Van Zyl*, 1959 (2) S.A. 571 (E); *R. v. Strange*, 1922 C.P.D. 469).

This presumption is, however, not conclusive of negligence (*R. v. Gobindram*, 1931 (2) P.H., O. 11 (N)), but would arise where there is an **absence of any reasonable explanation** as to how, or why, the collision occurred (*Marais v. Caledonian Insurance Co.*, 1967 (4) S.A. 199 (E), *Khan v. Texas Co. of S.A. (supra)*). For an instance where no reasonable explanation could be forthcoming see *R. v. De Beer*, 1940 E.D.L. 248, where it was found that two motorists collided in the middle of the road on the crest or rise of a hill.

A classical example of a bus-driver imprudently going over to his wrong side of the road in order to pass an abandoned vehicle ahead of him, when there was a blind bend in the road only 60 yards away, is to be found in *S. v. Mkwanazi*, 1967 (2) S.A. 593 (N). Here it was decided that, since the risk of harm to oncoming vehicle drivers was by no means remote, but a very real possibility, the bus-driver was responsible for the emergency which he had created in passing the abandoned vehicle at a slow pace and that the conviction should be upheld.

The 'road' for this purpose is the tarred surface thereof even if gravel exists at the side of the highway (*Liebrandt v. Katzeff*, 1951 (4) S.A. 189 (C); *Stewart v. Bresler*, 1951 (3) S.A. 942 (C)). In regard to what is the middle of the road, it has been held that, in the absence of evidence to the effect that a 'white line' is in the middle of the road, it is not negligence to drive on the wrong side of it (*R. v. Van der Schuur*, 1937 (2) P.H., O. 12 (C)) but this ruling is doubtful in view of the fact that the very purpose of the white line is to ensure the uninterrupted flow of traffic in opposite directions.

It is not necessary, however, to show that there was an **actual collision**, for injury may result in other ways owing to the negligence of a driver being on his incorrect side of the road (*Gain's Golden Grain Bakeries, Ltd. v. Gouws*, 1929 T.P.D. 137). In this case the accused, in a van, attempted to pass a vehicle in front of him and proceeding in the same direction. The plaintiff, travelling in the opposite direction to the van, which was then on its wrong side of the road, was forced on to some loose sand on the side of the road, producing a skid and causing the plaintiff to crash into a stone wall. Here the Court held that the proximate cause of the accident was the negligence of the van driver (defendant). Per Feetham J.:

'Where injury results from the meeting of two parties on a road whether or not there is an actual collision and one of the two is on the wrong side of the road, if the evidence shows a reasonable probability that the accident resulted from want of a precaution which the party on the wrong side of the road should have taken, he is liable unless the other party is shown to have been guilty of contributory negligence.'

In this regard it is an offence to encroach on the wrong side of the road on a curve without having an unobstructed view for a distance of 500 feet (*R. v. Nair*, 1948 (2) S.A. 9 (N), and section 107 of the Ordinances).

DRIVER'S DILEMMA

A number of decisions on this particular aspect of negligence relate to the dilemma of the party who, when travelling on his correct side of the

road, finds that he is being approached by another vehicle driven on its incorrect side of the road. What is he to do?

The answer is that he is not necessarily negligent in continuing a course on his correct side of the road on the assumption that the car, approaching on its incorrect side, will alter its course in due time to avoid a collision (*R. v. Rabie*, 1946 E.D.L. 347). In other words, the driver of a vehicle, proceeding at a lawful speed on his proper side, is entitled to expect that another vehicle, approaching on its wrong side, will timeously give way and move over on to its own correct side of the road (*Solomon v. Musset & Bright*, 1926 A.D. at 433; *Steenkamp v. Steyn*, 1944 A.D. 536; *Minister of Defence v. African Guarantee Co.*, 1943 A.D. 141, and *Springbok Boating Co. v. S.A.R. & H.*, 1945 A.D. 121). In other words, he cannot be faulted for assuming that the wrongdoer will **persist** in his wrongful conduct in driving on the incorrect side of the road, until a collision occurs (*R. v. Phillips*, 1949 (2) S.A. 671 (O); see also *Stewart v. Bresler*, 1951 (3) S.A. 942 (C)).

There may, however, be circumstances in which it is obvious to the plaintiff that if he does not move over more to his left, a collision will inevitably ensue. In such circumstances he should take such reasonably evasive action as he can. (*Williams v. Nel*, 1939 W.L.D. 188 at 196).

He should, *inter alia* (when he sees that the party approaching him is **not giving way** or returning to the proper side of the road), **reduce his speed** and go slowly (*Swart v. Van Rooyen*, 1937 C.P.D. 367), and may even have to **pull up** altogether in order to avoid a collision (*Pienaar v. Norbye*, 1939 C.P.D. 293). Where, therefore, the facts showed that the plaintiff, on sighting defendant's motor-car approaching him on its incorrect side of the road, applied his brakes and slowed down somewhat and, in addition, turned more to the left, it was held that he had done everything that might be expected from a reasonable man and had, therefore, not been negligent (*Minister of Defence v. African Guarantee & Indemnity Co., Ltd.*, 1943 A.D. 141). He should not be faulted, for failing to leave the tarmac and ride on the gravel portion of the road where the gravel portion is obstructed by a drain ahead (*Stewart v. Bresler*, *supra*). See also *Leibrandt v. Katzeff*, 1951 (4) S.A. 189 (C) at 192. If however the gravelled portion of the road is free from obstructions and perfectly traversible he should, if he can, move on to it if, by so doing he is able to avoid a collision. His failure to adopt this course would render him liable to an apportionment of damages (*Kleinhans v. African Guarantee & Indemnity Co., Ltd.*, 1959 (2) S.A. 619 (E)). On the other hand, it has been ruled that where the driver on the correct side of the road has failed (a) to hoot, (b) to ease over more to the left, and (c) to slow down, he may be faulted for his failure to do so (*Myburg v. Kelley*, 1943 E.D.L. 123). It cannot always be said, however, that the party on his correct side of the road is guilty of *culpa* merely because he failed to come to a dead stop (*Pitman v. Scrimgeour*, 1947 (2) S.A. 22 (W)). Thus in *Marais v. Caledon Insurance Co., Ltd.*, 1967 (4) S.A. 199 (E), it appeared that, as a result of the defendant's being on the wrong side of the road when 97 feet from the plaintiff's scooter, plaintiff had applied his brakes and had skidded across the road into the way of the defendant who, at the time of the collision, had returned to his correct side. Held, that plaintiff was entitled to his full damages since the emergency created by defendant was the sole cause of the collision.

In determining whether plaintiff should have moved over more to his left (e.g. leave the tarmac), the plaintiff's conduct must not be judged in the light of subsequent events nor meticulously examined 'in the placid atmosphere of the court in the light of after-acquired knowledge' (*Cooper v. Armstrong*, 1939 O.P.D. at 148), but by the standard of what a reasonable man would have done at the time (*Stewart v. Bresler*, 1951 (3) S.A. 942 (C) at 950). (See *ante*, pp. 314-16.)

The natural temptation, when one sees that the approaching vehicle is apparently not going to give way, is to swerve over to one's incorrect side of the road. In such circumstances it usually happens, however, that the other party, at the last moment, has also decided to return to his correct side and a head-on collision results. The case of *Jackson v. Nicolaai*, 1943 C.P.D. 227, is illustrative of such a position (for the facts of which see below). If the party on his correct side of the road **needlessly** goes on to his incorrect side of the road in such circumstances he will undoubtedly forfeit some of his damages by reason of his own contributory negligence (*Bonthuys v. Visagie*, 1931 C.P.D. 75; *Le Roux v. Taylor*, 1936 P.H., O. 10 (T); *R. v. Molife*, 1935 E.D.L. 253; *Williams v. Nel*, 1939 W.L.D. 188 at 196, and *Kleinhans v. African Guarantee and Indemnity Co., Ltd.*, 1959 (2) S.A. 619 (E) at 624), and he may even himself be liable to apportionment of damages to the other party if it can be said that he was the one who had an opportunity to avoid the collision (*Jackson v. Nicolaai*, *supra*). The courts will be slow, however, to deprive a plaintiff of his right to recompense where, under such circumstances and **as a last resort**, he decides to go over on to his incorrect side of the road to avoid a collision (*Pienaar v. Norbye*, 1939 C.P.D. 293; *Laing v. Vermeulen*, 1943 C.P.D. (J/C 116/43); *Kleinhans's case* (*supra*) at 625. For other cases see *Brown v. Hunt*, 1953 (2) S.A. 540 (A.D.) at 546; *Van Staden v. May*, 1940 W.L.D. 198, and *R. v. Zucker*, 1934 E.D.L. 269).

DIVIDED HIGHWAY

Where a highway is divided into two lanes by a grass strip, the negligence of the driver in proceeding along the wrong strip in the face of all oncoming traffic can be so great and of such an unexpected character that a reasonable motorist would not be apt to foresee and to guard against it (*Taljaard N.O. v. Potgieter*, 1964 (4) S.A. 613 (A.D.) at 616). In this case the driver's widow failed to establish any negligence on the part of the defendant, who thought that the deceased was going and not coming towards him until it was too late to avoid a collision. See also section 108 of the Ordinances. This position may be equated to a one-way street (*post*, p. 384). Obviously, if a motorist sees and appreciates that another has inadvertently entered the wrong section of the street and is coming towards him, he should take all reasonable steps to avoid a collision.

Cases

In the following instances the driver was held to have been guilty of **negligent** driving:

Where the defendant was travelling at high speed with his wheels over the centre of the road and failed to veer to his correct side or slow down when he saw deceased coming from a side street on his motor cycle in such a way that, unless the accused did get to his correct side, an accident was imminent (*Roos v. De Loors, Ltd.*, 1931 T.P.D. 100).

Both parties, when 100 yards apart, were approaching each other on their incorrect sides of the road. Plaintiff immediately and gradually turned to his correct side but the defendant did not. Held, that the plaintiff was entitled to damages (*Page v. Lyon*, 1938 E.D.L. 235).

Plaintiff, on seeing the defendant approaching him on his incorrect side of the road, moved over more to his left and slowed down to 15 m.p.h. and hooted. As the defendant continued to approach on his incorrect side, plaintiff changed gears, put out his hand and, as a last resort, went over on to his incorrect side of the road where a head-on collision occurred owing to the defendant also turning to that side at the last moment. Held, the plaintiff was entitled to damages (*Pienaar v. Norbye*, 1939 C.P.D. 293).

Where, owing to the defective nature of his brakes (a fact known to the accused) his car veered over on to the incorrect side of the road, causing his vehicle to collide with a Native cyclist travelling on his correct side of the road, it was ruled that he had been negligent (*R. v. Stipp*, 1940 E.D.L. 29).

The accused travelled on a road 26 feet wide, passed a car, and kept wholly on the wrong side of the road for 100 yards to within 30 yards of a cloud of dust from which emerged a car coming in the opposite direction on its correct side of the road at 30 m.p.h. Held, he had been grossly negligent (*R. v. Times*, 1941 E.D.L. 38). See also *Croeser v. Jacobs*, 1942 P.H., O. 3 (C), and *Pitman's case*, 1947 (2) S.A. 22.

In making a right-hand turn in an intersection a person should keep to the left-hand sides of both streets in which he is travelling, that is to say he should pass the point of intersection in the centre of the road on his right and not on his left (*R. v. Morum*, 1940 E.D.L. 17). This duty is now prescribed by provincial regulations and may be altered by the road signs (see 'Cutting Corners', below).

Where the accused, on entering an intersection of a street, passed to the right of an island placed in the middle thereof for the protection of pedestrians and, in so doing, killed a pedestrian, it was held that he had been grossly negligent (*R. v. Jooste*, 1938 C.P.D. (J/C 312/43)).

Where the defendant, on seeing the plaintiff in the distance on his incorrect side of the road, needlessly went on to his incorrect side of the road (*Bonthuys v. Visagie*, 1931 C.P.D. 75, and *Le Roux v. Taylor*, 1936 P.H., O. 10 (T)).

Where the defendant, who was in a lorry standing on a bridge some 27 feet wide, began to move diagonally across the bridge on the approach of the plaintiff, who hooted and thought that the defendant would straighten out, but instead of that the defendant continued on to his wrong side of the road and collided with the plaintiff (*Entumeni Sugar Milling Co. v. Johnson*, 1932 N.P.D. 534).

Where the plaintiff was climbing a hill round a bend at a slow pace on a slippery road and met the defendant coming down on his correct side of the road, the defendant not being able to pull up his car in time to avoid a collision, the court held that the accident was caused by the *plaintiff's own negligence*, because the defendant had a paramount right and was entitled to preference on his side of the road (*Samuels v. Drew*, 1936 N.P.D. 337).

Plaintiff was proceeding in a heavily laden lorry up a steep mountain pass on his incorrect side of the road at about 5 m.p.h. At a sharp bend in the road he collided with the defendant who had been driving on his correct side, when he saw plaintiff some 50 to 70 feet away. To obviate a collision plaintiff swerved to his correct side of the road when he was about 10 feet from the defendant. Defendant swerved suddenly when he was 10 feet away. Held, that the defendant had the last opportunity to avoid a collision and was consequently liable in damages (*Jackson v. Nicolaai*, 1943 C.P.D. 227). This seems to be a hard case.

Where the defendant was approaching the crest of a hill on his incorrect side of the road and suddenly came into sight of the plaintiff at the top of the rise when the vehicles were about 10 yards apart causing the plaintiff to swerve to his incorrect side of the road at the same time that the defendant veered to his correct side (*Swart v. Albertyn*, 1935 C.P.D. 71). See also *R. v. Zucker*, 1934 E.D.L. 269, where the accused was convicted for doing the same thing.

Where the accused went on to his wrong side of the road to pass a tram and there collided with the complainant, who came suddenly from behind the tram (*R. v. Marais*, 1932 P.H., O. 42 (C)).

Where accused tried to overtake a cyclist on his left instead of on the right it was decided that he had been acting culpably (*R. v. Press*, 1938 P.H., O. 15 (C)).

Where defendant travelled on his wrong side of the road in a dust-storm and collided with plaintiff (*Bosch v. Rennie*, 1928 E.D.L. 149).

Where defendant, while crossing a street diagonally at a slow speed on his wrong side of the road in order to get back on to his correct side in time to avert a collision, saw S, who was travelling on a motor cycle at about 20 m.p.h. on his correct side of the road, whereas S was looking in a different direction, to the defendant's knowledge, and was not conscious of the presence of the defendant's car, the Court held that, assuming S was negligent in not having seen defendant's car earlier, the defendant had been negligent in ignoring the facts which were apparent to him; and that his negligence in taking the risk while on his wrong side, of attempting to cross S's path before S reached him, without accelerating his speed, was the proximate cause of the accident (*Sapford's Guardian v. Oberholzer*, 1933 O.P.D. 239).

In the following instances it was decided that the driver was **not negligent** in the circumstances:

Where, though the accused was on his incorrect side of the road the cause of the deceased's death was attributable solely to the latter's sudden swerve into the way of the accused's vehicle (*R. v. Hawkens*, 1934 E.D.L. (J/C 389/34)).

Where the accused, in order to pass a van which would not make way for him, swerved to his right and passed on the right-hand side of several tramway poles, causing some motor-cars coming in the opposite direction, to swerve to their left in order to avoid him (*Dowling v. Pretoria Municipality*, 1927 T.P.D. 235). This decision is of doubtful authority.

Where the defendant's being on the wrong side of the road at the time of the accident was alleged by him to be due to the fact of a fractured king-pin in his steering-gear, a contention which though not accepted by the Court, might nevertheless have been true (*De Wet v. Adams*, 1935 T.P.D. 247).

Where the accused, who was travelling some 18 feet behind a car in front of him at about 30 to 35 m.p.h., suddenly found that that car was pulling up to avoid an unlighted wagon in the way and, in order to avoid a collision with that car, he was obliged to go on to his incorrect side of the road, where he collided with the complainant who was then approaching from the opposite direction on his motor-cycle (*R. v. Wallach*, 1934 T.P.D. 293). The decision in this case is doubted and commented upon (*post*, p. 457).

(For the position regarding parking on the wrong side of the road, see *post*, p. 386.)

3. CUTTING CORNERS AND TURNING

The general rule was that a driver was permitted to make a right-hand turn only by keeping the centre of the square of the intersection on his right and he was not permitted either to ride over it or to pass it on his left (*R. v. Snell*, 1922 E.D.L. 153; *Sams v. Deen*, 1915 N.P.D. 370) and section 113(2) of the Ordinances. A failure to observe this rule was deemed to constitute negligence in the event of damage or injury being inflicted (*Morley v. Wicks*, 1925 W.L.D. 13; *Mizen v. Ries*, 1914 E.D.L. 511). This rule has, however, been productive of frequent traffic blockages and congestions since, if two streams of traffic, approaching in opposite directions both desire to turn to their right they would encounter one another in their way and neither could proceed any further. Accordingly it has now been made lawful, by traffic road signs on the road surface, for a driver to pass the centre of the square of the intersection on his left and thereby enable a vehicle, coming from the opposite direction and turning right, to pass him on his left, provided he does not encroach on his incorrect side

of the road as he **enters** the intersection and is also on his correct side before making his **exit** therefrom. (See *R. v. De Swart*, 1949 (1) S.A. 516 (N); and section 113(2)(ii) of the Provincial Ordinances.

The overall duty of the driver wishing to turn to his right is set out in *Milton v. Vacuum Oil Company*, 1932 A.D. 196 at 205, where Wessels J.A. said:

'When a person does wish to cross the line of traffic and turn out into a side street he is entitled to do so, but he must give ample warning of his intention both to vehicles behind him and to those approaching in the opposite direction, and he must do so at an *opportune moment* and in a *reasonable manner*.'

To 'cut the corner', in the sense indicated above, would entail criminal liability for an accident (*R. v. Morum*, 1940 E.D.L. 17) and for damages in a civil action (*Good v. Posner*, 1934 O.P.D. 90). See also *Bell v. Minister of Economic Affairs*, 1966 (1) S.A. 251 (N) at 256, and *Davidson v. Cape Town City Council*, 1965 (2) S.A. 559 (C) at 562.

A driver should not, therefore, assume that the traffic approaching him will slow down to enable him to pass across the line of traffic, but he must **wait** until he is assured of a safe passage (*R. v. Court*, 1945 T.P.D. 133). See also *Sierborger v. S.A.R. & H.*, 1961 (1) S.A. 498 (A.D.). The place selected by him to await the passage of all oncoming vehicles, whose drivers desire to pass straight ahead through the intersection, must however be on his left-hand side of the road centre-line, for, if he intrudes on to his incorrect side and in the process thereby causes a collision with such oncoming vehicles he will be guilty of negligence (*R. v. Kennedy*, 1965 R.L.R. 520 (A.D.) at 524-5).

Even when the driver wishes to turn to his **left** he should bear in mind that the following traffic may be endangered if he executes his manoeuvre suddenly and without warning (*Reemers v. A.A. Mutual Insurance Assn., Ltd.*, 1962 (3) S.A. 823 (W)). He should be on his extreme left before turning (section 113 of the Ordinances).

In *S. v. Peinke*, 1963 (1) S.A. 96 (E), it appeared that the appellant, in seeking to turn to his right, had veered to the middle of the road, leaving ample space for traffic, overtaking from behind, to pass him on his left, but the complainant had, very negligently, endeavoured to pass him on his right and here it was held that the appellant had wrongly been convicted. (See also 'Signalling intention to Turn', *post*, pp. 436-8.)

Modern street and traffic engineers, recognizing the necessity of moving traffic speedily and safely, have in many towns and cities so demarcated the road surfaces at robot-controlled intersections as to enable turning vehicles to pass each other on their left, within the intersection, the procedure is for the driver, when the traffic light is green in his favour, to enter the intersection but stop short of the middle line of the cross-street, but still to remain on the left-hand side of his own street, until it is safe to make his right-hand turn, either when there is no further oncoming traffic approaching him, or else when it has been held up by the traffic light turning amber against it. In the latter event he can make his turn to his right before the traffic light turns green in favour of the traffic on his right-hand side. He should however (a) signal his intention to turn and (b) be alert to move expeditiously when the appropriate moment presents itself. His failure, however, to move himself swiftly and safely out of the

way would provide no warrant or authority for other traffic drivers to move forward and collide with him the instant the traffic lights turn to green in their favour. (See *Van Zyl v. Gracie*, 1964 (2) S.A. 434 (T), and *post*, p. 374.)

Illustrative cases

In the following cases the court came to the conclusion that the driver cutting the corner was **not guilty** of negligence:

Where plaintiff cut the corner at a slow pace and collided with the defendant's car which was travelling at great speed, the cars having come into view at some 35 yards apart and where the proximate cause of the collision was the defendant's speed and his failure to keep a proper look-out (*Schoeman v. Schoombie*, 1936 E.D.L. 91).

Where the plaintiff, in travelling up a road, had collided with the defendant coming down, the Court decided that the accident was due, not to the defendant's cutting the corner to his right, but to the plaintiff's own negligence in failing to observe the defendant's clearly given intimation to make a right-hand turn (and to the plaintiff's speed) (*Milton v. Vacuum Oil Co.*, 1932 A.D. 197). In both *Leppan v. Grahamstown Municipality*, 1930 E.D.L. 396, and *Parker v. Beattey*, 1919 W.L.D. 63, the plaintiff, who was initially wrong in cutting the corner, was allowed to recover from the defendant, who had thereafter ignored the plaintiff's clearly manifested intention to cross to the correct side of the road. Today damages would be apportioned.

4. INTERSECTIONS AND CROSS-STREETS

(a) UNCONTROLLED ROADS OF EQUAL IMPORTANCE

(i) *General rule*

The primary duty of a person in charge of any vehicle, when reaching an intersection of two uncontrolled roads, is to ensure that the intersecting road is clear of moving traffic for a sufficient distance to enable him to cross such roadway without obstructing or endangering other traffic thereon (see section 110(1) of the Ordinances). Usually he would look first to the **right**, and then he would look towards his **left**, to see what traffic is coming in either direction, and then he would look ahead to see whether there is anything in front of him to obstruct his progress and, only after having satisfied himself on all these points would he be entitled to proceed (*Sapford's Guardian v. Oberholzer*, 1933 O.P.D. 239; *R. v. Immerman*, 1937 O.P.D. (J/C 164/37)). When crossing wide streets, especially those demarcated by central traffic islands, he should, when reaching them, or the centre of the road, look again to his left for oncoming traffic (see (1967) 84 S.A.L.J. 148-50; *Frolick v. Morris Taxi Service (Pty.) Ltd.*, 1967 (3) S.A. 508 (A.D.); *Wulf v. City Tramways*, 1945 C.P.D. 3, and *post*, p. 368). In *R. v. Stander* (E.D.L. 13/2/1939), the Court drew attention to the fact that there was a traffic regulation prohibiting a 'motor-car from entering any street from another until the driver has satisfied himself that the street about to be entered is free from obstruction of any nature in the direction in which he intends to proceed' and confirmed a conviction for negligent driving where this precaution had not been taken. It should be noted, in passing, that this regulation applied only to a driver in a side street and not to the driver in a main thoroughfare (*R. v. Le Fleur*, 1947 P.H., O. 14 (C)).

He must also regulate his speed so as to be able to stop in time to avoid a car crossing his path (*Minister of Posts & Telegraphs v. Moore*, 1948

P.H., O. 11 (T), 1949 (1) S.A. 815 (A.D.)). The speed and distance of the approaching car are the prime considerations for the determination of the question whether to proceed safely on into the intersection in the path of the oncoming car or not (*Coetzee v. Van Rensburg*, 1954 (4) S.A. 616 (A.D.) at 623).

(ii) *Right of way?*

Where no 'give way to the right' rule exists a motorist entering an intersection of two streets a reasonable time before another would have, in general, a **right of priority** which he may properly exercise with due regard to the circumstances and with reasonable care (*Higgs v. Van Schalkwyk*, 1930 P.H., J. 37 (O); *Van der Westhuizen v. S.A. Liberal Insurance Co.*, 1949 (3) S.A. 160 (C)), with this qualification, however, that this right is **not an absolute one**, for he must still be careful. (*De Kock v. Silva*, 1934 T.P.D. 150, followed in *Viljoen v. Meiring*, 1936 C.P.D. 169; see also *Webber v. Solomon's Motors (Pty.) Ltd.*, 1937 E.D.L. 299; *Cooper v. Armstrong*, 1939 O.P.D. 140; *Gibbons v. Hoffmann*, 1940 C.P.D. 160; the general view being that the driver of the first vehicle entering the intersection is entitled to assume that the other driver is keeping a proper look-out and will take steps to avoid a collision (*Pullen v. Pieterse*, 1954 (2) S.A. 195 (T)).

In *Pierce v. Hau Mon*, 1944 A.D. 175 at 217-18, however, the Chief Justice stressed the danger of relying on any so-called right of priority, and his remarks, quoted below, were cited with approval by Hoexter J.A. in *Coetzee v. Van Rensburg*, 1954 (4) S.A. 616 (A.D.) at 623:

'It is in my view inadvisable to attempt to lay down any general rule which suggests that a motorist entering an intersection of two streets before another has any right of priority. For example, if one of the two cars enters the intersection a *fraction of a second* after the other, it would be extremely dangerous to say that the driver of the latter has a right of priority. To take, again, the case of two cars proceeding at *different speeds*: the driver of the one, proceeding at a very slow speed, may be courting disaster if, having entered the intersection first, he were to rely on his so-called right of priority.'

See also *Bain v. Edwards*, 1944 C.P.D. 194. Where, however, a driver enters a crossing some time before another, he is entitled to assume that that other will act reasonably and respect his right of priority (*Coetzee v. Van Rensburg* (*supra*) at 623).

This duty, still to be careful, is based on the fact that one cannot always expect due care and respect from other drivers on the road (*Robinson Bros. v. Henderson*, 1928 A.D. 138). In this case it was proved that the defendant had been negligent in not keeping a proper look-out, but it was also established that the driver of the plaintiff's car had seen the car at a considerable distance from the crossing but had **ignored it**, considering that as he had the right of way he could continue on his course. The Court found that the plaintiff's driver had been guilty of contributory negligence. Per Solomon C.J.:

'Now assuming that, as the defendant himself admitted, the plaintiff in the circumstances had the right of way, the whole question would appear to be whether he acted reasonably, in entirely ignoring the approaching car, on the assumption that the driver would respect his right of way and would avoid coming into collision with him. In my opinion that is not the conduct of a reasonable man. It is the duty

of every driver of a motor-car when approaching a crossing, no matter whether he believes he has a right of way or not, to have regard to traffic coming from a side street. There is necessarily a certain amount of danger in approaching a crossing, and it is the duty of every driver to exercise reasonable care to avoid coming into collision with another entering from a side street. Having seen such car, he was not justified in taking no further notice of it, on the assumption that the driver is a careful man and may be relied upon to respect his right of way. If every driver of a motor-car were a reasonable man there would be few accidents. **It is against the careless and reckless driver that one has to be on one's guard.**'

This decision was followed in *R. v. Welsh*, 1941 E.D.L. 200, and *Thorn-ton v. Fisser*, 1928 A.D. 398, where the Chief Justice said:

'While the plaintiff might assume that the driver of the other car would act reasonably, that did not entitle him to close his eyes to the car which he has seen approaching, for it is still his duty to be vigilant and to try to avoid an accident in case the owner of the other car should be careless or reckless.'

(See *ante*, p. 33 for the postulated rule to meet the two opposing views.)

In *Pullen v. Pieterse*, 1954 (2) S.A. 195 (T), it was held that the driver who arrives first at an intersection of roads of equal importance, and sees another vehicle approaching the cross-road at a normal speed and at an apparently **safe distance**, is entitled to assume that the driver of the other vehicle is keeping a proper look-out and has seen him, and also that if he proceeds to cross the intersection in front of the other car, the other driver will take steps to avoid a collision: He is not obliged to keep his eyes continually on that other car and ignore other traffic or other parts of the road (*ibid.*).

A motorist approaching an intersection of streets should, however, allow for the possibility of another motor-car approaching such intersection of the other street at a somewhat high speed, but not at a speed which is dangerous or reckless (*Van der Westhuizen v. S.A. Liberal Insurance Co.*, 1949 (3) S.A. 160 (C) at 173), but if, when he does enter it, he sees a car some distance off, he is entitled to assume that the driver thereof will slow down (*Cooper v. Armstrong*, 1939 O.P.D. at 146) and will not recklessly run him down (*Martindale v. Wolfaardt*, 1940 A.D. at 244). The general opinion, therefore, is that the driver first arriving at an intersection is entitled, if the other is **still some distance off**, to assume that the latter is keeping a proper look-out and will take steps to avoid a collision (*Pullen v. Pieterse*, 1954 (2) S.A. 195 (T)). He has, however, no 'right of way', and whether he will be entitled to proceed into the intersection must depend on the circumstances of each particular case. It is not, however, necessary for him to keep his eyes fixed on the approaching car all the time (*ibid.*). *Moore v. Minister of Posts and Telegraphs*, 1949 (1) S.A. 815 (A.D.), followed.

In *Cooper v. Armstrong* (*supra*) it was decided that a person entering an intersection is entitled to assume that other persons using the streets would not conduct themselves with 'suicidal abandon'. See also *Martindale v. Wolfaardt*, 1940 A.D. at 244, distinguished in *R. v. Coleman*, 1940 T.P.D. (J/C 124/40), and *R. v. De Beer*, 1940 E.D.L. 248. (These cases are discussed *ante*, p. 33.)

It is submitted that the proper attitude of a driver at intersections should be as follows:

- (a) He is fairly entitled to assume that other road-users will act reasonably and competently, i.e. not with 'suicidal abandon', unless the conditions or circumstances do, or should, put him on his guard that the other road-user may be acting imprudently or incompetently, and
- (b) the assumption that others will act prudently does not relieve him of his duty to keep a good look-out and to take immediate steps to avoid an accident in the event of others acting negligently.

See *Woods v. Administrator of Transvaal and another*, 1960 (1) S.A. 311 (T) at 314; *Van der Westhuizen and another v. S.A. Liberal Insurance Co., Ltd.*, 1949 (3) S.A. 160 (c) at 173; *Robinson v. Henderson*, 1928 A.D. 138 at 141; *Thornton v. Fisser*, 1928 A.D. 398 at 410; *Martindale v. Wolfaardt*, 1940 A.D. 235 at 242; *De Kock v. Silva*, 1934 T.P.D. 150 at 154. Much, naturally, depends on the distances such vehicles are apart (see *Galante v. Dickinson*, 1950 (2) S.A. 460 (A.D.)).

In Rhodesia the wholesome rule is to the effect that drivers entering intersections of more or less equal importance must **give way** to the traffic approaching from the **right**, and this is now also a rule in South Africa, but unfortunately only when moving round traffic islands (section 112 of the Ordinances). It should be made a rule applicable to all uncontrolled roads of reasonably equal importance.

(iii) *Plaintiff's dilemma?*

Prior to the passing of Act 34 of 1956, intersection collision cases often resulted in a stalemate, for, **where the streets are of equal importance**, the burden which the plaintiff undertook to prove that the defendant's negligence was the proximate cause of the accident was, in practice, so heavy that it was seldom, if ever, discharged (*Murray v. Britz*, 1933 N.P.D. 352; *Pierce v. Hau Mon*, 1944 A.D. 175, and *Bain v. Edwards*, 1944 C.P.D. 191). Per Hathorn J. in quoting his remarks in *Wishart v. Mason*, 1931 P.H., O. 16 (N):

'It will be convenient here to say that in every cross-road collision between motor vehicles where, as here, the streets or roads are of equal importance, the burden which the plaintiff undertakes of proving that the defendant's negligence is the proximate cause of the accident is in practice so heavy that it is seldom, if ever, discharged. For the plaintiff is on the horns of a dilemma. He has virtually to admit that he himself was negligent. If he says that he saw the other vehicle at the proper time, then he must explain why he did not stop or take other adequate means to avoid the accident. It is difficult to conceive of any circumstances (except in most exceptional cases) in which an acceptable explanation can be given. Thus the plaintiff is himself negligent in failing to avoid the other vehicle. That is one horn of the dilemma. The other horn is this: If he says that he did not see the other vehicle at the proper time then he admits thereby that he did not keep a proper look-out and again he is negligent. Because of the continued refusal of the courts to analyse the various acts of negligence of the two parties in motor collision cases, in which the events take place in a second or two, and to decide what act of negligence is the proximate cause of the accident, even where the plaintiff proves that the defendant was negligent, the almost invariable result is that the plaintiff cannot succeed because he was negligent himself and consequently the proximate cause is found to be the joint negligence of both parties. The present case is an example, and a very ordinary example, of this type of case.'

These remarks were quoted with approval in *Webber v. Solomon's Motors*, 1937 E.D.L. 299, but in *Gibbons v. Hoffmann*, 1940 C.P.D. 160, it was opined that this judgment took altogether a too pessimistic view of

the plaintiff's chances of success, while in *Jennings v. Parag*, 1955 (1) S.A. 290 (T) at 294, Murray J. also considered that Hathorn J.'s statement in *Wishart's* case had been 'too widely stated'. In any event since the dictum was made when the defence of contributory negligence was a complete reply, and the position has now been completely altered by the Apportionment of Damages Act, it is clear that the postulated dilemma is only academic and has no application today, save perhaps in Rhodesia where the archaic rule, of contributory negligence being a complete defence, still exists. Even here, however, where the 'give way to the right' rule obtains, no dilemma arises for, when a driver sees that the vehicle to his right has stopped in order to give way to the driver on *his* right-hand side, the former may then proceed straight ahead on his course forward, but would have to hold back if his intention was to turn to his right in the intersection. In *Diesel v. Vermaak*, 1934 E.D.L. 117, the Court found that the plaintiff was in a similar position and, since both he and the defendant had not kept a proper look-out as they entered the intersection, granted absolution from the instance. (*Johannesburg Municipality v. Derbyshire*, 1909 T.S. 386; *Swadling v. Cooper* [1931] A.C. 1; also *Jackson Bros. v. Mortlock*, 1934 C.P.D. 281, and *Dall v. Ashley*, 1933 P.H., O. 14 (W)).

Now that the 'last opportunity' rule has, as a complete defence, been abrogated by statute, the decision in *Nolutshungu v. Alliance Assurance Co.*, 1952 (4) S.A. 155 (A.D.), would not be applicable, save as a warrant for apportionment of damages. The undermentioned illustrative cases would also now be only instructive as to the proportion of liability attributable to the respective parties concerned.

Illustrative cases

In *R. v. Storrar*, 1933 N.P.D. 110, the two cars entered an intersection 73 feet by 69 feet at the same time, both on their correct sides of the road. Deceased evidently lost her head and swerved to the right (when she saw the accused on her left) and collided with the accused's car from behind. The Court, on appeal, found, however, that had both parties continued on their ordinary courses no collision would have occurred and that the accused had therefore been wrongly convicted.

In *Delpont v. Clarence*, 1939 N.P.D. 311, the appellant had driven into an intersection with his windows up and badly frosted, thereby obscuring his view of respondent's car with which he collided, and the Court ruled that his negligence (a) in failing to see the respondent, and (b) in turning at too great a speed, was the sole cause of the accident. See also *Cooper v. Armstrong*, 1939 O.P.D. 140, where the decision in *Wishart v. Mason*, *supra*, was described as 'a cry of despair' and where the Court was able to find that the defendant's negligence in centring her attention on her passenger when approaching the intersection was the proximate cause of the accident and awarded damages accordingly. In *Jackson v. Morris Taxi Service*, 1943 N.P.D. 296, again, the Court was able to find that, as the appellant had cut the corner at an intersection and was on his incorrect side when he collided with the respondent, he had been negligent and that his negligence was the effective and proximate cause of the collision. Where the defendant was travelling at 60 m.p.h. and saw plaintiff crossing the intersection on a bicycle 100 yards away, yet nevertheless, thinking that he had the right of way, continued on and collided with the plaintiff cyclist, it was decided that the latter was entitled to damages (*Van Tonder v. Clarkson N.O.*, 1940 T.P.D. (J/C 153/40); see *post*, p. 482).

In *Moore v. Minister of Posts & Telegraphs*, 1949 (1) S.A. 815 (A.D.), damages were recovered from defendant who approached an intersection at an abnormal speed.

In *Van der Westhuizen v. S.A. Liberal Insurance Co.*, 1949 (3) S.A. 160 (C), plaintiff, on nearing the intersection at 18 m.p.h., saw the defendant some 50 yards away and, considering that she had ample time to cross, accelerated, but was struck by defendant

who was travelling at a high speed and not keeping a proper look-out. Held, that she was entitled to damages (see also *Dickinson v. Galante*, 1949 (3) S.A. 1034 (S.R.)).

In *Doig v. S.A. National Trust Co.*, 1950 P.H., O. 3 (W), damages were granted to a motor-cyclist who entered an intersection at 40 m.p.h. and collided with a motorist who saw him but who failed to stop as he could have done instead of deciding to pass in front of the cyclist.

(iv) *Overtaking in an intersection*

Many by-laws of the municipalities prescribe rules prohibiting a driver from overtaking another vehicle within the confines of the intersection of two streets except on the left of the vehicle sought to be overtaken when the latter is about to make a right-hand turn. The mere act of overtaking in such circumstances is not, however, necessarily proof per se of negligence (*R. v. Nathan*, 1938 T.P.D. 170).

(b) MAIN ROADS AND SIDE STREETS

Under this caption may be treated the problems relating to (i) Right of way, (ii) Blind corners, (iii) Stop streets, and (iv) Forked roads.

(i) **Right of way**

Public roads are for the common use of all persons to enable them to reach their destinations in all directions, and there is at common law no rule of law which gives precedence to vehicles on the main artery (*Milton v. Vacuum Oil Co. of S.A., Ltd.*, 1932 A.D. 197, and *Robinson v. Henderson*, 1928 A.D. at 141), but the party entering a main thoroughfare from a **side street** should exercise great care (*R. v. Haupt*, 1931 C.P.D. 267). Per Lourens J.:

‘Having regard to the obligation which rests on any person entering a busy main road from a side road, I agree with the magistrate that anyone who comes into a main road from a side road should exercise the utmost care, but at the same time the users of the main roads are also under an obligation to exercise care when they pass side roads. People are as much entitled to use the side roads as main roads, and when a person drives in a main road past a side road at an excessive speed, he certainly runs a risk and even if a person comes carefully into the main road, he may have a collision.’

In other words, while there is a duty on the driver entering a main road from a side street to exercise considerable care before doing so, there is also a reciprocal duty on the driver in the main street to exercise some care and accommodate himself to the other driver’s manoeuvre and not to endanger the latter vehicle (*Roos v. De Loors, Ltd.*, 1931 T.P.D. 100). (The facts of this case are quoted *ante*, p. 123.) See also *Lang v. London Transport Executive* [1959] 3 All E.R. 609 (Q.B.).

In *Martindale v. Wolfaardt*, 1940 A.D. 235, it was decided that when the driver of a car along a main thoroughfare, upon which it is usual to travel at a fair speed, observes another car approaching such main road at a slow speed, the former is entitled to ‘regulate his manner of driving on the assumption that the other driver will not suddenly, without warning and recklessly, expose himself and others to danger’. Consequently such former driver cannot be expected to anticipate, in such a case, that the approaching driver will try to cross the main road before him. Where in such a case the former driver assumed that the latter would stop to enable him to pass, the Court held that this assumption was justifiable, and that he had not been negligent in the circumstances. See also *Cooper v. Arm-*

strong, 1939 O.P.D. 140, and *Moore v. Minister of Posts & Telegraphs*, 1949 (1) S.A. 815 (A.D.). On the other hand the approaching driver is not entitled entirely to ignore the signal of intention to turn given by another driver and to proceed straight ahead as if it had not been given at all, for he should watch that car and, if he sees that the latter car does not stop, he should reduce his speed so as to avoid a possible accident (cf. *Van Zyl v. Gracie*, 1964 (2) S.A. 434 (T)).

However, irrespective of how main or important a street may be, the priority of its traffic is not absolute; it must always be reasonable. The speed at which a driver is entitled to approach and cross an intersection must bear some relation to the importance of the street in which he is travelling as compared with the street he is about to cross. His speed, furthermore, must be related to the amount of traffic that each street may reasonably be expected to bear (*Fester v. Duncan*, 1940 C.P.D. 316). Even where the driver in the main street is travelling at a speed as high as 40 m.p.h., the driver from the side street who is emerging at 5 m.p.h. should be able to avoid a collision since, at that speed, he can bring his vehicle to a dead stop at a moment's notice (*Joubert v. Bekker*, 1952 (3) S.A. 245 (T)).

Even if a look to the left does not reveal the approach of traffic in the main street or thoroughfare, such act does not exempt the driver from looking again to his left if (a) the main thoroughfare is a wide one or (b) a busy one and (c) the driver proceeds slowly across the intersection (*R. v. Hendrickse*, 1965 R.L.R. 611 (A.D.)). Thus in *Dunn v. Macpherson* 1931 P.H., O. 14 (N), Hathorn J. held that the driver entering a main road through a by-road should not attempt to cross unless either (a) he was sure that there was no traffic or (b) that the traffic was sufficiently far away to enable him to cross, or (c) that the traffic would have ample opportunity to observe him and have time to regulate its course in order to let him pass. Having taken these precautions he will not be liable for the act of another person in the main road in swerving into him (*R. v. Watson*, 1937 S.R.; (1938) *S.A.L.J.* 79; *Galante v. Dickinson*, 1950 (2) S.A. 460 (A.D.), and *Lang v. London Transport Executive* [1959] 3 All E.R. 609 (Q.B.)), and this obligation at common law has now been made a statutory offence (see section 87(6) of Ord. 26 of 1956 (N)). It follows that where the right of way is determined by statute, a person who negligently fails to observe this rule may find himself held liable in damages for injury caused thereby (*Tomlinson v. Barrett*, 1939 S.R. at 59). On the other hand, even though the plaintiff has, under the provisions of a by-law, the right of way at an intersection, he must still keep a proper look-out, and if he fails in this respect he will have to bear a proportion of the damages subsequently sustained, notwithstanding the fact that the defendant has contravened the by-law in question (see *Malcolm v. Kimber*, 1934 N.P.D. (J/C 218/34); *Murray v. Britz*, 1933 N.P.D. 352, and *Critchfield v. Mordecai*, 1931 P.H., O. 1 (W)).

A distinction should be drawn between **national roads** and ordinary roads to the extent that people entering a national road should take care and see that the road is clear before entering it (*R. v. Barrish*, 1940 P.H., O. 10 (C)). Even where the driver on the main road makes no provision to save himself when first seeing the driver on the country road, he is not

in *culpa* for failing to anticipate negligence so gross as to justify the description of the act of a madman (*Schultz v. Kotton*, 1952 P.H., O. 14 (W)).

Cases

The following are further instances where the party concerned has been found to be negligent.

Where the bus-driver, though he saw the plaintiff's clearly indicated intention to cross the street about 50 yards ahead of him, nevertheless continued at a speed of 30 to 40 m.p.h. and collided with plaintiff's laden wagon (*R. v. Harrison*, 1927 E.D.L. 262).

The plaintiff, on entering the street, saw no traffic on her left save a tram a good distance away and far enough for her to think it safe to cross which she did at a slow pace and in a gradual turn, bringing her car to a position on the tram-lines almost parallel with them. Just as she did this a tram collided with the rear of her car. Held, the tram-driver was negligent (*Port Elizabeth Tramway Co. v. McAuliffe*, 1934 E.D.L. 170).

Where A had approached from a side road at a moderate speed and collided with B who was travelling at 40 m.p.h. on the main road, the Court held that B was negligent (*R. v. Haupt*, 1931 C.P.D. 267).

Plaintiff and defendant were approaching an intersection at right angles to each other. The plaintiff sounded his hooter and immediately the defendant slowed down to about 5 m.p.h. The plaintiff thought the defendant was going to stop and proceeded on his way, but the defendant did not stop and a collision occurred in the intersection. The magistrate dismissed the plaintiff's claim for damages on the ground that he had been guilty of contributory negligence in not himself stopping. The plaintiff clearly had the right of way. On appeal, however, the Court decided that plaintiff was entitled to succeed (*Pakenham Walsh v. Wynn*, 1937 P.H., O. 15 (S.R.)).

The plaintiff on the main road, when he saw defendant entering the main street, did, in fact, deviate. Defendant, seeing this, thought he could cross the street and thought that plaintiff would deviate sufficiently to pass him on his left. The Court found, however, that when defendant entered the main street he did so at a speed which was excessive and when it was then too late to avoid a collision, and granted damages for £1,000 accordingly (*Cohen v. Van der Vyver*, 1928 G.W.L. 16).

(ii) Blind corners

No better summary of the duty of the driver of an automobile when approaching a blind corner can be given than that which is contained in the dictum of De Waal C.J. in *Victoria Falls Power Co. v. Thornton's Cartage Co.*, 1931 T.P.D. 516:

'When a person driving a car approaches a street which is a main thoroughfare and on which he is aware that there is likely to be a considerable amount of traffic he must approach the intersecting street with due care and be prepared to expect traffic. His first duty is to see that there is no traffic approaching from **his right**, and then to look for traffic approaching from **his left**. Where the **visibility** at the point of intersection is such that the driver is able to see a considerable distance in both directions in the intersecting street, he is entitled to enter the intersection at a greater speed than if the visibility is obscured. . . . But where the visibility is obscured, where, in other words, the corner is a blind corner, he must exercise greater care. On approaching such a corner his first duty is to look to the right, and if he sees no traffic, he should look to the left. If no traffic is observed approaching in either direction, then, as his line of vision increases as he proceeds, **he should keep both directions**, in the order mentioned, **under observation**, and have his car under complete control should approaching traffic enter his line of vision. It is his duty to proceed at a slow pace until he can clearly see that no traffic is approaching, first to the right and secondly from his left. If there is traffic he should proceed with due regard to the position of such traffic on the road he is entering.'

These views were accepted and followed in *Van der Merwe v. Union Govt.*, 1936 T.P.D. 185, and *Gibbons v. Hoffmann*, 1940 C.P.D. 160. See also *Sapford's Guardian v. Oberholzer*, 1933 O.P.D. 239; *R. v. Richardson*, 1936 P.H., O. 21 (T), and *Styger v. Blignaut*, 1932 P.H., O. 27 (O); *Duncan v. Bowles*, 1941 S.R. 255, and *Moore v. Minister of Posts & Telegraphs*, 1949 (1) S.A. 815 (A.D.).

In *Jackson Bros. v. Mortlock*, 1934 C.P.D. 281, the plaintiff, driving a motor-car approaching a cross-street round a blind corner, did not see a car coming from the side street until it was $5\frac{1}{2}$ yards distant. If he had kept a proper look-out he would have seen it 15 yards away. Defendant approaching from the side street said he thought that he could cross in front of plaintiff's car and accelerated to do so. When half-way across the road he saw that he could not get over, applied his brakes and swerved, but could not avoid a collision. On appeal the Court came to the conclusion that though plaintiff had been negligent, the proximate and decisive cause of the collision was the defendant's negligence and therefore plaintiff was not debarred from recovering damages.

Criminal proceedings

Sentiments similar to those expressed in *Murray v. Britz*, 1933 N.P.D. 252 (p. 363, *supra*), have been reflected in criminal cases in regard to the desirability of instituting criminal proceedings where accidents occur round blind corners. Thus in *Enright v. R.*, 1928 T.P.D. (J/C 319/28), it was considered that where a collision takes place at an intersection of two streets where the vision of the drivers is obscured by buildings on all sides, it is not desirable that a prosecution should take place unless it is clear that one or other of the participants has been guilty of negligence. Unless, therefore, the case is very clear against one of the two parties, it is better for the police to allow them to fight the matter out in a civil action. See also *R. v. Lotz*, 1927 T.P.D. 836 at 838, and *R. v. Naude*, 1930 T.P.D. (J/C 336/30). It is submitted, therefore, that in suitable cases where one or other of the parties is clearly negligent, the right course is to proceed against him by way of criminal prosecution, or it may be proper for the State to institute proceedings against both culpable drivers (*R. v. Immerman*, 1937 O.P.D. (J/C 164/37)), but both wrongdoing drivers should not be cited as joint accused in a charge of culpable homicide (*R. v. Meyer*, 1948 (3) S.A. 144 (T); see also *R. v. Corbett*, 1949 P.H., O. 21 (E)). In any case, the statements in *Enright's* case and in *R. v. Lotz* (*supra*) must not be taken to mean that the accused is entitled to his acquittal merely by reason of the fact that the accident took place in an intersection (*R. v. Jennings*, 1937 T.P.D. (J/C 349/37)).

(iii) Stop Streets

Purpose

Axiomatically the creation of the stop street is to reduce the ever increasing number of damages, injuries and deaths caused by collisions wherein motor vehicles have been involved and to provide statutory limitation to the rule expressed in *Milton v. Vacuum Oil Co.*, 1932 A.D. 197 at 205, which is to the effect that there is no rule of law which gives absolute

precedence to vehicles in the main thoroughfare. They are designed to compel the driver seeking to enter the main artery from a side street to come to a dead stop, thereby affording him the maximum of time to take full cognizance of all approaching traffic, from both directions, in the through street, and to give the vehicles therein full precedence of progress. See *Bothma v. Zentkowsky*, 1951 (1) S.A. 63 (T) at 65–7. In other words the stop streets are there to assist the traffic in the through street and to put the onus on drivers in the stop streets to halt and ascertain if they can proceed further with safety (*R. v. Clarke*, 1949 (2) P.H., O. 31 (N)). Drivers in the through streets are entitled, therefore, unless put on their guard, to assume that the stop street drivers will obey stop signs and at stop lines (*Aboubaker v. Haliday*, 1955 (2) S.A. 633 (C) at 634–5; *Ulrich v. Pepler & Co. (Pty.) Ltd.*, 1935 C.P.D. 46).

Duty of Stop Street Driver

The driver upon approaching a stop street sign must bring his vehicle to a complete halt and must both look and listen in both directions in order to apprehend fully what vehicles are approaching, how far they are away, at what speed they appear to be progressing and then, only if quite satisfied that it is safe for him to enter the intersection, may he proceed further. If, at the stop sign, there is a van obscuring his view, he must still proceed with the greatest caution (cf. *Sullivan v. Economic Insurance Co.*, 1955 (4) S.A. 447 (T)). A failure to stop at the stop street line is not, in itself, negligence (*R. v. Thom*, 1948 (2) S.A. 1058 (N)) and this is so even where the driver has pleaded guilty to negligent driving (*S. v. Rohrmann*, 1967 (3) S.A. 411 (S.W.A.)), but if a driver is involved in a collision then his failure to stop enters into the picture and is one of the circumstances which has to be taken into account in order to determine whether he was negligent or not (*ibid.*). Accordingly, where a tram-driver in a through street gave every indication of stopping at a ‘compulsory tram-stop’, the reasonable belief on the part of the vehicle driver in the side street that he was, in fact, about to stop, was held to be sufficient to exculpate him from criminal culpa (*R. v. Mathlane*, 1955 (1) S.A. 283 (A.D.) at 286, followed in *Van Niekerk v. South British Insurance Co., Ltd.*, 1955 (2) P.H., O. 8 (W), (where absolution with costs was awarded in favour of the defendant stop street driver)).

Technically, a driver should stop at the stop line of the street, but criminal liability will not always ensue where the driver stops short of that line, e.g. 12 feet short, and where he still has a good view of all approaching traffic for a considerable distance to left and right (*R. v. Pienaar*, 1947 (1) P.H., O. 4 (O)). In this case the Court held that the regulation had been sufficiently complied with. On the other hand he is not entitled to make his decision to proceed into the intersection at any point so far short of the stop line that a material change in the situation may occur during the period taken by him to come up the intersection line (*Joubert v. Bekker*, 1952 (3) S.A. 245 (T) at 248; *Matse v. S.A. Trust and Insurance Co.*, 1954 (1) P.H., O. 5 (T). See also *Wulf v. City Tramways Co., Ltd. and Black*, 1945 C.P.D. 3 at 18).

The duty to keep a **proper look-out**, before entering an intersection, would imply that it is not sufficient for the stop street driver merely to look to

his right and then to his left for he should again look to his right before crossing the intersection line (*Joubert v. Bekker (supra)*). In this case it was found that, had he done so, he would have been convinced that he could not have proceeded with safety. Having looked in either direction and having seen an approaching vehicle, the side street driver's further duty is to keep it under observation and so regulate his vehicle that he can avoid a collision (*Wulf v. City Tramways Co., Ltd. and Black*, 1945 C.P.D. 3).

The duty of the stop street driver to look in both directions before, and whilst entering a main and wide thoroughfare was overlooked by the Court in *Frolick v. Morris Taxi Services (Pty.) Ltd.*, 1967 (1) S.A. 205 (N). In this case it appeared that the plaintiff was travelling on a through-way at night-time and defendant, who was approaching at right angles on plaintiff's right, had failed to stop at the stop line but had continued slowly at the same speed after looking only to his right. Only when approaching the centre line of the street did he look to his left and, upon observing the plaintiff's approach, brought his car to a sudden halt some 3 feet short of the said centre line. Plaintiff, however, seeing that the defendant was not respecting his right of way and thinking he would continue on, swerved violently to his left in order to avoid the threatened collision and collided with a parked car. Here the Court, in dismissing plaintiff's claim, did so on the ground that, although the plaintiff had adequate reason for thinking as he did, the defendant had not been negligent *quoad* any other traffic by not stopping at the stop line, after seeing that the road to his right was clear of traffic, and owed no duty to the plaintiff to do so. This decision was criticized by the author in (1967) *S.A.L.J.* 148 and was subsequently duly reversed on appeal in 1967 (3) S.A. 508 (A.D.). See also *R. v. Hendrickse*, 1965 R.L.R. 611 (A.D.), for an instance where the driver failed to look again to his left after entering the intersection.

A privileged vehicle, e.g. a police van, is not entitled to ignore a stop street altogether and the driver thereof may properly be found guilty of negligence in so doing (*Minister of Justice v. Bristow-Jones*, 1950 (4) S.A. 362 (T) at 365).

Duty of the Through Street Driver

In order to cope with the ever-increasing heavy load of traffic in all congested built-up areas the aim and object of the traffic authorities, especially in peak traffic periods, is to enable the traffic to get moving **both safely and quickly**; consequently, the maximum prescribed speeds in the main traffic routes have been lifted considerably while the entrances thereto are controlled by stop signs, or give-way signs in order to meet this pressing need.

The actual duty of the through-way traffic driver, vis-à-vis the side-street driver, has been the subject of some conflicting decisions. It seems agreed, however, that the through street driver has **no absolute right of way**, in the sense that he is entitled to ignore altogether the **presence** of a through-street driver entering the intersection (*Sullivan v. Economic Insurance Co.*, 1955 (4) S.A. 447 (T) at 452; *Marfuggi v. Queensland Insurance Co., Ltd. and another*, 1959 (3) S.A. 888 (S.R.)), and he should, therefore keep

some general look-out for the latter (*Franco v. Klug*, 1940 A.D. 126 at 135; *Subel v. Van Zyl*, 1960 (3) S.A. 575 (T) at 577); nor is he entitled to travel at an **excessive speed** in the main thoroughfare merely because he has such right of way (*R. v. Thompson*, 1960 (3) S.A. 64 (T)). On the other hand, it is not the duty of a motorist in a through street to approach an intersection in a side street on the assumption that a motorist in the latter street may be intending unlawfully to ignore the stop sign in such street (*Bothma v. Zentkowsky*, 1951 (1) S.A. 63 (T)): Still less is he obliged to anticipate that another vehicle, which is behind the vehicle approaching a stop street and which has stopped, will emerge into the through-way (*Fitzgerald v. Minister of Justice*, 1961 (3) S.A. 142 (T) at 145-6).

The difficulty arises as to the duty of the through street driver when he observes a car approaching an intersection and whether he should assume that the latter is not going to stop. In *Stein v. Grove*, 1949 (3) S.A. 540 (T), Malan J. ruled that he should keep that vehicle under 'continuous observation' until it has in fact stopped, but this view has been dissented from in *R. v. Mathlane*, 1955 (1) S.A. 283 (A.D.) at 286, and *Von Wezel v. Johannesburg City Council*, 1955 (4) S.A. 159 (T) at 164, and it is submitted that these latter cases correctly state his liability in this respect. But what is the position if he sees that the side street driver is proceeding at such a speed that the latter is unlikely to stop? It is the common and unnerving experience of many, not infrequently, to see a stop street driver dash up to the stop street sign and then vigorously apply his brakes to bring his vehicle to a halt just on the stop line. Certainly the dictum in *Bothma v. Zentkowsky*, 1955 (1) S.A. 63 (T), (that when the through street driver sees a side street, he must look into it to see if a driver therein is approaching), cannot be accepted since such procedure would thereby reduce the speed of the traffic in the main road to that of a funeral procession and would result in a pile up of traffic for a considerable distance behind. (*Von Wezel v. Johannesburg C.C.* 1955 (4) S.A. 159 (T) at 164; *sf. R. v. Mathlane*, 1955 (1) S.A. 283 (A.D.) at 286.) Nor, it is submitted, is the statement of Malan J. in *Stein v. Grove*, 1949 (3) S.A. 540 (T) at 543, although the car approaching along the intersection may give indications of intending to stop it is the duty of the through-street driver to keep that car under 'continuous observation' a correct statement of the duty involved (see *Von Wezel v. Johannesburg C.C.* (*supra*), at 164, and *R. v. Mathlane* (*supra*) at 286). The correct rule is that, while he should give the said vehicle some regard, there is no obligation to keep it under continuous observation (*Sullivan v. Economic Insurance Co.*, 1955 (4) S.A. 447 (T) at 452).

Once, however, the side-street driver has **emerged** from the side street and is in the intersection then a definite duty would rest on the through-street driver to watch carefully and to take all such steps as may be necessary to avoid a collision (*Ulrich v. Pepler & Co. (Pty.) Ltd.*, 1935 C.P.D. 46; *Wulf v. City Tramways Co., Ltd. and Black*, 1945 C.P.D. 3 at 15; *Cramer v. S.A.R. & H.*, 1949 (2) S.A. 125 (T) at 128).

The general rules were postulated by Murray J. in *Joubert v. Bekker*, 1952 (3) S.A. 245 (T) at 249, as follows:

- (a) that the through street driver is entitled to rely on the protection of the stop sign;

- (b) that he must, however, take precautions against a collision with vehicles which may either have entered the intersection in breach of the law, or can be seen to be about to do so;
- (c) but if he sees, or ought to see, the approach of a vehicle in a stop street which gives no indication to a reasonable observer, either by its speed or otherwise, that the driver does not intend to stop at the intersection line he (the through street driver) cannot be blamed for proceeding on his course and maintaining a look-out only to his front.

It is in regard to the third proposition that objection is taken (*Sullivan v. Economic Insurance Co.*, 1955 (4) S.A. 447 (T) at 453; *Electricity Supply Commission v. Le Roux*, 1954 (1) S.A. 104 (T) at 108, and *Wulf's case*, *supra*, since logic and necessity dictate that if it comes to the notice of the through street driver that a vehicle is entering, or is about to enter, the intersection without stopping, then he should take all reasonable steps to avoid it (*Cramer v. S.A.R. & H.* (*supra*); *Subel v. Van Zyl*, 1960 (3) S.A. 575 (T) at 578, and *Joubert v. Bekker* (*supra*)).

The duty of the through street driver to 'keep a general look-out', mentioned in *Franco v. Klug*, 1940 A.D. 126 at 135, does not mean keeping a look-out for traffic a considerable distance away from the stop street sign in the stop street (*Electricity Supply Commission v. Le Roux* (*supra*) at 108, and *Sullivan's case*, *supra*. See also the dictum of Jones J.P. in *Wulf v. City Tramways, Ltd.*, 1945 C.P.D. 3 at 15, quoted with approval in *Cramer v. S.A.R. & H.* 1949 (2) S.A. 125 at 128).

'A driver of a vehicle proceeding towards and across an area of intersection of two streets on his proper side . . . is not entitled to proceed without looking out for, and paying heed to, any vehicle which may be emerging from a cross-street into and across the intersection, even though the driver of any such vehicle approaching the area of intersection is required by law to stop and to satisfy himself that he may do so without endangering his own safety or that of any other person. For although the driver of any such vehicle is required to stop and must not proceed until he has satisfied himself that it is safe to do so, that does not absolve the drivers of vehicles approaching the intersection from another direction from the duty of looking out for and avoiding if possible any vehicle which may be entering the intersection from a stop street. To hold otherwise would be to encourage and justify drivers of vehicles approaching the intersection along non-stop streets, in proceeding without observing caution towards vehicles which have entered the intersection without having stopped or which have stopped as required by law and have then proceeded to enter, deeming it safe to do so.'

While, therefore he has a preferent right of way, he is not entitled to ignore altogether the presence of stop streets (*Ulrich v. Pepler*, 1935 C.P.D. 46; *Bothma v. Zentkowsky*, 1951 (1) S.A. 63). In other words, while he must show some duty of care, the **degree** of such care is so minimal that the side street driver will experience considerable difficulty in defeating the through street driver's defence of sudden emergency (cf. *Ulrich's case*, *supra*; *Rose's Car Hire, Ltd. v. Rice*, 1940 (2) P.H., O. 39 (T); *Electricity Supply Commission v. Le Roux* (*supra*)).

Onus

Before the stop street driver can succeed in establishing negligence on the part of the through street driver (for the purpose of apportionment) he would have to show that the defendant was culpable, not only in failing

to observe the approach of his vehicle, but also that, had the defendant been diligent and had seen him, the defendant would, in some way or another, have been able to avoid a collision (*Cramer v. S.A.R. & H.*, 1949 (2) S.A. 125 at 128). The reaction time, and the emergency of the occasion, would naturally have to be taken into consideration in this regard.

What is the position if the through street driver fails altogether to have seen the vehicle entering the intersection or fails to see it timeously in order to avoid a collision? Is he in any better position than a driver who does see the wrongful entry of the stop street driver but fails to take reasonably adequate evasive action. It is submitted that, on the authority of *Sutherland v. Banwell*, 1938 A.D. 476 at 486, that the inattentive driver's position is the same, namely that, if by the exercise of ordinary care, he should have been aware of the stop street driver's intransigence, he is in the same position as one who does in fact observe it (*Von Wezel v. Johannesburg C.C.* 1955 (4) S.A. 159 (T) at 164, and *Sullivan v. Economic Insurance Co.*, 1955 (4) S.A. 447).

In this regard it is submitted that the **degree of care** required of the driver in looking out for the negligent or reckless driver emanating from a stop street is not as great as that of a driver passing an **uncontrolled** intersection and that while he should have some regard to this possibility by exercising some general look-out, the court will be slow in finding that he was in some degree to blame for the resultant collision and, even if it does find some degree of *culpa* on his part, the apportionment of damages (and the costs of the case) will have to be more greatly borne by the stop street driver (cf. *Subel v. Van Zyl*, 1960 (3) S.A. 575 (T) at 578-9).

(iv) Give-Way Streets—Yield Signs

The purpose of the creation of give-way signs has, in general, the same objectives as stop signs, the only difference being that the driver in the side street is not obliged actually to stop. Therefore, while there is no obligation upon him to come to a halt he must, nevertheless, not enter the through street unless, and until, he has satisfied himself that he can do so with safety to himself and others by looking carefully in both directions and he should 'give preference' to all vehicles in the through street (*Marfuggi v. Queensland Insurance and another*, 1959 (3) S.A. 888 (S.R.) at 890-1). In this case the plaintiff, when he perceived the entry of the side street driver, had swerved to his left but was unable to avoid a collision and it was held that he was entitled to his damages. See also *R. v. Coetzer*, 1965 R.L.R. 579 (A.D.), where it was held that a driver in approaching a give-way sign and intending to turn to his left must, if the road consists of single-lane traffic in each direction, look also to his left in order to ensure that the road is free of traffic which may legitimately be on the wrong side of the road and in the act of overtaking another vehicle or in the act of turning right in the through road. (See also *S. v. Bosch*, 1963 (1) P.H., O. 6 (T), and *Van der Colff v. South British Insurance Co., Ltd.*, 1963 (2) P.H., O. 62 (T).)

(v) Forked roads

It is the duty of the driver, when approaching a part where the road on which he is travelling forks out into two different directions, to have proper

regard to traffic coming towards him in both roads (*R. v. Roup*, 1936 C.P.D. (J/C 773/36)). In this case the accused, in a motor-car, was approaching a point where the main road divides into two forks, one to the right which carried the main traffic, and the other to the left which is a side street and did not carry so much traffic. The accused collided with a cyclist coming down the side-street fork. On appeal it was held that he was rightly convicted, since it was his duty to expect traffic coming down that street which might cross his intended line of travel in coming into the main street, and that he could not expect that the cyclist would respect his right of way based on his, the accused's, assumption that he had a preferent right over the cyclist in keeping to the right-hand fork.

(c) ROBOTS

(1) Red lights

Robots, constituting as they do the mechanical devices for the regulating of the safe passage of traffic, are to be treated differently from stop streets in the sense that (a) they give a greater right of precedence to the driver in whose direction the green light is shining, and (b) impose a much stricter duty on the driver faced with the red light. Even so, there is no absolute right of way, for even if the green light is in favour of a driver he is not entitled entirely to ignore the presence of another vehicle which happens to be in his way, as often happens when vehicles are caught by a change of the lights while waiting their turn in making a right- or left-hand turn (see *South British Insurance Co. v. Barrable*, 1952 (3) S.A. 239 (N)). In such cases it is the duty of the driver, in whose favour the traffic light has turned green, to take cognizance of the traffic ahead of him and to wait until the drivers thereof have made their turn and have got out of his way (*Cockram v. Durban City Council*, 1965 (1) S.A. 795 (N) at 801–2; *South British Insurance Co., Ltd. v. Barrable*, 1952 (3) S.A. 239 (N) at 243; *Doorgha and others v. Parity Insurance Co., Ltd.*, 1963 (3) S.A. 365 (D) at 367). In the **absence** of any traffic ahead of him, he is entitled to assume that all other traffic approaching from the left and right of him will obey the red lights against them and will stop in order to give him his right of way (*Cockram's* case at 355). Nor should he be called upon to anticipate the possibility that the red traffic lights will be disregarded by traffic proceeding at right angles to the direction in which he is approaching (*Central News Agency v. Schocher*, 1943 T.P.D. 355 at 359).

The general rule, therefore, is that where a driver disregards the red light against him and enters the intersection he may be deemed to be *prima facie* guilty of negligence (*Johannesburg City Council v. Lalor*, 1932 P.H., O. 3 (T), and *Von Wezel v. Johannesburg City Council*, 1955 (4) S.A. 159 (T)). The leading decision on the duties of drivers approaching traffic lights is that in *Joseph Eva, Ltd. v. Reeves* [1938] 2 All E.R. 115 (followed in *Serfontein v. Smith*, 1941 W.L.D. 195). Per Scott L.J.:

‘Nothing but implicit obedience to the absolute prohibition of the red—and indeed of the amber, subject only to the momentary discretion which it grants—can ensure safety to those who are crossing on the invitation of the green. Nothing but absolute confidence, in the mind of the driver invited by the green to proceed, that he can safely go right ahead, accelerating up to the full speed proper to a clear road in the particular locality, without having to think of the risk of traffic from left or right crossing his path, will promote the free circulation of traffic, which, next to

safety, is the main purpose of all traffic regulation. Nothing again will help more to encourage obedience to the prohibition of the lights than the knowledge that, if there is a collision on the cross-roads, the trespasser will have no chance of escaping liability on a plea alleging contributory negligence against the car which has the right of way. Finally, nothing will help more to encourage compliance with the summons of the green to go straight on than the knowledge of the driver that the law will not blame him if, unfortunately, he does have a collision with an unexpected trespasser from the left or right.'

If, therefore, a motorist at a robot-controlled intersection, with the green light in his favour, becomes conscious of the approach of another car from his right or his left, he is entitled to assume **even if the approaching vehicle is travelling fast**, that the driver will observe and obey the red light, although this may involve a sudden and violent application of his brakes (*Van der Walt v. Gershalter*, 1944 T.P.D. 240; see also *Serfontein v. Smith*, 1941 W.L.D. 195). In passing it should be noted that Milne J.P. in *Cockram's case* (*supra*) at 801-2, considered that the rule in *Van der Walt v. Gershalter* had been too widely stated. A motorist with the green light in his favour is therefore not guilty of negligence if he fails to anticipate that another will turn across his path without warning (*Foxton v. Rent-a-Car, Ltd.*, 1951 (2) P.H., O. 5 (T); *Crozier v. Byrne*, 1968 (2) P.H., O. 40 (T)). After stopping at a robot light a driver should not reverse his vehicle without first making sure that he is able to do so with safety (*Watt v. Western Assurance Company*, 1952 (3) S.A. 778 (W)). In this case he had reversed briskly into a pedestrian who was passing behind him. (See also *post*, p. 390.)

Proof

It has been held that the fact that the green light is in one's favour is not conclusive proof that the red light was shining to other drivers proceeding at right angles (*S. v. Grobler*, 1966 (4) S.A. 292 (T), following *R. v. Davids*, 1961 (1) P.H., O. 7 (C); *Siboriane v. S.*, 1969 (1) P.H., H. (S) 3 (T), and *Majozi v. S.*, 1969 (1) P.H., H. (S) 6 (N)). See also *R. v. De Haast*, 1967 R.L.R. 216 (A.D.) at 217-18, the reason given being that one cannot always assume that traffic lights are correctly synchronized or that mechanical devices like traffic lights do not go wrong. The same conflict of evidence between opposing witnesses appeared in *S. v. Ntshangase*, 1963 (4) S.A. 433 (T), but the decision went off on another point. These decisions can have far-reaching implications and, in order to avoid such conflicts of testimony the plaintiff, or the State, would be well advised to inspect such lights, after a collision, in order to satisfy the court that the lights were, in fact, properly synchronized and that, when the green light is showing one way, the lights reflecting at right angles thereto are in fact, showing red.

(2) The amber

A motorist, approaching an intersection controlled by traffic lights, has no general right to proceed against an amber signal. He should so regulate his speed that he will be able to respond to an adverse signal without a sudden stoppage. He may proceed against the amber only if he is so close to the intersection that, when the green light turns to amber, he is unable to bring his vehicle to a standstill (*Fay Fashions v. S.A.R. & H.*, 1946 T.P.D. 44, following *Joseph Eva, Ltd. v. Reeves* [1938] 2 All E.R. 115). The

amber light is, in effect, a warning to look out and expect traffic from both directions (*R. v. Cassim*, 1937 C.P.D. (J/C 40/37)). Therefore as soon as the light turns from green to amber he must be on the look-out for other traffic (*South British Insurance Co. v. Barrable*, 1952 (3) S.A. 239 (N)). Where, therefore, the defendant had entered the intersection when the robot had changed **from red to amber** and thereby collided with the plaintiff, the Court ruled that he had been culpable and awarded damages (*Sorenson v. Botha*, 1944 C.P.D. 66, and *Von Wezel v. Johannesburg City Council*, 1955 (4) S.A. 159 (T)). Nowadays all traffic lights turn direct from red to green and the amber shows only after the green light has been extinguished. When a driver of a motor vehicle knows that, on account of the moderate speed which he may be compelled by circumstances to maintain, he cannot traverse a 40-yard wide street intersection within the duration of the amber light, and therefore knows that, if he enters the intersection after the light has turned amber, traffic proceeding at right angles will have the right of way before he has traversed the intersection, his duty is to reduce speed sufficiently as he approaches the intersection to enable him to bring his vehicle to a standstill before entering the intersection if there is a reasonable possibility that the lights will turn to amber before he reaches the intersection line (*Cockram v. Durban City Council*, 1965 (1) S.A. 795 (N) at 799).

It is an offence under the by-laws to proceed against either the red or the yellow light. In this respect, therefore, the decisions relating to 'stop streets', *supra*, are of equal application.

For cases of 'beating the robot' see *R. v. Doorwaard*, 1938 T.P.D. (J/C 115/38), and *R. v. Guthrie*, 1942 T.P.D. (J/C 112/42).

(3) The Green light

The green light is designed to accord to the motorist, or vehicle driver, an assured progress of passage straight ahead but, as indicated above, he may not disregard all other traffic which may already be in the intersection (*R. v. Marais*, 1946 C.P.D. 261; *Minister of Justice v. Bristow-Jones*, 1950 (4) S.A. 362 (T); *S. v. Phillip*, 1968 (2) S.A. 209 (C) at 213-14). A distinction is therefore to be drawn between a driver who enters the intersection immediately after the lights have turned green, and who may encounter traffic already in the intersection, and one who enters it only when he sees that he has a free passageway. In the latter case he may not be faulted for continuing ahead whilst in the former he is still required to exercise great care (*Doorgha and others v. Parity Insurance Co., Ltd.*, 1963 (3) S.A. 365 (D); *Cockram v. Durban C.C.*, 1965 (1) S.A. 795 (N) at 802).

A driver who enters the intersection on the green light but who wishes to turn to his right will naturally have to take his right-hand traffic lane and then wait until all oncoming traffic has passed by before making his turn which, when the appropriate time comes, must be done with celerity and expedition. A driver who turns his vehicle over the centre line of the street, while waiting to proceed to his right, would be guilty of negligence if, in so doing, he obstructs and collides with oncoming traffic.

(4) The pedestrian

The position of the pedestrian at robot-controlled crossings is unique. He has, in general, no guarantee of safety when he sees the green light

showing indicating that he may cross, for he is liable to be overtaken and run down by traffic (legitimately obeying the green) from two directions, that is to say, either from the rear on his right-hand side or on his front right-hand side, if he is travelling on the left-hand side of the street. On the other hand, if he is progressing on the right-hand side of the street, traffic approaching him may wish to cross his path from the left when he has nearly completed his crossing of that street, or it may overtake him from behind on his left. Only by elaborate systems of crossed yellow lights can this difficult problem be solved; otherwise the only basis of security is for the pedestrian to keep a good look-out and for the motorist courteously to allow pedestrians to cross over first before completing his turn, for, although a robot gives the pedestrian the right of way over turning vehicles, he must still keep a proper look-out, and his failure to keep a proper look-out will usually result in his being deprived of a portion of his damages (cf. *Pincus v. Solomon*, 1942 W.L.D. 243, also *post*, p. 447). On the other hand, it has been held that the fact that a pedestrian has attempted to cross a street with the robot against him will not, in a criminal action, give immunity from conviction to the driver of a car who is charged with endangering his life, since it may be expected that pedestrians will, when half across the street, be caught with the robot changing against them (*R. v. Cooper*, 1938 N.P.D. 172). In *Drekster v. Ocean Accident & Guarantee Co.*, 1953 (4) S.A. 698 (N), the pedestrian, who was proceeding with the green light in his favour, succeeded in recovering damages from a motorist making a right-hand turn.

In Durban the municipal authorities have found a suitable solution to the problem by causing all the traffic lights to shine red in all directions for a reasonable period thus enabling pedestrians to cross over the intersection, in every direction, with safety.

(5) Privileged vehicles

Privileged vehicles, such as fire-engines, ambulances and police vehicles are often required to proceed to their destinations with the maximum of celerity and, in order to enable them to accomplish their duties in this regard, provisions have been made either in the local by-laws or in the provincial Ordinances (see secs. 79 (Cape) and 116(1)(h) (Transvaal)) obliging all other vehicles to give them the right of way whilst the siren is sounding. In regard to cases where the red traffic light is showing against the privileged driver the rule is that, while he is entitled to proceed against it he may do so only when he has fully satisfied himself that it is safe to proceed and that he will not endanger other traffic lawfully proceeding with the green light in their favour (*R. v. Marais*, 1946 C.P.D. 261 at 265; *Central News Agency v. Schocher*, 1943 T.P.D. 355). This is so because the driver entering a clear intersection in his favour is under no duty to look out for vehicles which may enter the intersection against the lights (*Serfontein v. Smith*, 1941 W.L.D. 195 at 198; *Van der Walt v. Gershalter*, 1944 T.P.D. 240 at 243; *Joseph Eva, Ltd. v. Reeves* [1938] 2 All E.R. 115 (C.A.)). Accordingly, the driver of a police van is not entitled, after sounding its siren, to proceed to cross against the red light without, any regard whatsoever to other traffic which may be in the intersection (*Minister of Justice v. Bristow-Jones*, 1950 (4) S.A. 363 (T)), and if he does

do so, and collides with a car, the driver of which has not heard the siren, without looking out properly he may be convicted of negligent driving (*R. v. Evans*, 1962 (3) S.A. 358 (S.R.)). In *Minister of Justice v. Bristow-Jones*, it was decided that the regulation obliging traffic to give way to privileged vehicles did not cancel out the regulation or law to stop at red traffic lights and that they both remained of equal force.

In *Johannesburg C.C. v. Public Utility Transport Corporation*, 1963 (3) S.A. 157 (W), a fire-engine was coming down at an acute angle to Bartlet Road in such a position that it should have been seen by the driver approaching it in that road. It slowed down to turn to its right round an island at the junction of the two roads with its siren making a loud wailing noise and its bell clanging and three flickering lights burning. The defendant's driver ignored all these warnings and here the Court held that the driver of a fire-engine is entitled to make a much higher assumption as to what other traffic will do than the ordinary driver may; he has a perfect right to assume that other traffic will be careful to keep out of his way. He must, however, keep a careful look-out not to run anything down. If he sees a bus and other cars coming along, he has a right to assume that the drivers thereof have heard his siren, and seen his vehicle and will get out of his way.

On the other hand, if a driver, upon approaching an intersection, hears the sound of an oncoming privileged vehicle to his right or left, he should exercise some degree of caution in expectancy of the possibility that it may not stop at the red light and if he fails to do so and in disregard of its announced approach, proceeds straight ahead, this will undoubtedly induce the court to apportion damages against him for his own degree of negligence (cf. *Phillip's* case, below, at 216).

A traffic officer, when overtaking a line of slowly moving or stationary vehicles, should not travel too close to such vehicles and, if he can perform his functions (e.g. to investigate the cause of a blockage) only by so doing, he should give due warning of his approach (*Davidson v. Cape Town City Council*, 1965 (2) S.A. 559 (C), following *Tonyela v. S.A.R. & H.*, 1960 (2) S.A. 68 (C)).

Where a driver collides with a fire-engine at a street crossing governed by a traffic light in the driver's favour, the State, before it may obtain a conviction for his negligent driving, must establish that he could, and should, have heard the warning siren of that vehicle (*S. v. Phillip*, 1968 (2) S.A. 209 (C)).

(6) Backing against the red light

An interesting position arose in *R. v. Raad*, 1942 C.P.D. 184, the facts of which were that the appellant, who had pulled up at a point beyond the robot light which had been in his favour, decided to reverse his car back over a pedestrian lane, because he was rather near a bus stop. He proceeded to do so, but in the meantime the robot had gone against him. He did not notice this, nor did he take the trouble to look. At the time there were pedestrians crossing the street at the point. Held, he had driven without care and attention and without reasonable care and consideration for others using the road.

In *Watt v. Western Assurance Co.*, 1952 (3) S.A. 778 (W), the defendant

motorist, thinking that he was too near the intersection line, reversed back a few paces and in so doing collided with a pedestrian who was crossing the street behind him. Held, he was liable in damages notwithstanding the fact that the pedestrian was crossing the street in contravention of the by-laws at a place other than at a pedestrian crossing. (See also *post*, p. 390.)

(7) Traffic lanes

In cross streets, both of which take two or more lines of traffic travelling in the same direction, it is the duty of the driver who desires to take a right-hand turn to place himself in that line which is nearest the centre of the street (*R. v. Hattingh*, 1935 N.P.D. 336). For a case relating to taking a turn round a robot, see *African Tobacco Manufacturers (Pty.) Ltd. v. Inglis*, 1935 N.P.D. 66. In approaching an intersection demarcated by traffic lanes the driver must not turn from one lane into or across another unless he can do so without obstructing or endangering traffic travelling in that lane (section 110(3) of the Ordinances). His duty, when desirous of turning left, is to move into the extreme left-hand lane at a reasonable distance from the point where he intends turning and into the right hand lane at a similar distance should he wish to turn to his right.

5. TRAFFIC ISLANDS, CIRCLES AND ROUNDABOUTS

Where vehicles are negotiating a traffic island, or circle or roundabout, the rule is to proceed to the left thereof in clockwise fashion and reason dictates that the drivers should give way to traffic entering the circle on the right, while those on the driver's left should, in all prudence, allow him to pass before entering the circle from their streets. This rule is now given effect to by section 112 of the Ordinances.

In regard to the **duty to signal**, which may arise in respect of those already travelling in the circle, it has been held that much depends upon the particular circumstances and that, save where such drivers, whether driving one behind the other or alongside each other, should conduct themselves as reasonable persons, no general standard by which to assess their conduct can be laid down (*Rondalia Versekeringskorporasie van S.A., Bpk. v. Pretorius*, 1967 (2) S.A. 649 (A.D.)). In this case the motor cyclist in the circle had intended to continue round the circle whilst the motor vehicle driver behind him had, upon quite insufficient grounds, thought that he was proceeding straight through the circle as he himself intended to do. When the cyclist continued to his right there was a collision and the trial court held that (a) there was no obligation upon the cyclist to signal his intention to continue round the circle and (b) that the car driver was 100 per cent negligent in endeavouring to overtake the cyclist ahead of him in the circle. The Appeal Court was not prepared to alter the finding of negligence.

In *Johannesburg C.C. v. Public Utility Transport Corporation*, 1963 (3) S.A. 157 (W) at 159, Hiemstra J. held that while it was the duty of a driver to signal his intention to turn right at a traffic island, the fact that a fire engine had slowed down to a speed of 5 m.p.h. should have created a strong expectation in the mind of the defendant that the driver was intending to turn to his right since, if he had no such intention, he would have picked up speed much quicker than he did.

In view of the above decisions and considerations it is not surprising that traffic roundabouts are rapidly falling into desuetude, and are being replaced by ingenious traffic lights.

6. PEDESTRIAN CROSSINGS

Some of the larger municipalities make special provision for the safety of pedestrians in congested areas by the establishment of pedestrian crossings. At such places (usually marked by a robot) it is the duty of the motorist to concede the right of way to any pedestrian who happens to be about to cross the street at that point (*Selikman v. London Assurance*, 1959 (1) S.A. 523 (W)). On approaching such demarcated place he should slow down to such a speed as to be able, if necessary, to stop before reaching the crossing, and should allow the free and uninterrupted passage to any foot passenger who is on the carriage-way at such crossing, the latter having precedence over all vehicular traffic thereabouts (*Franco v. Klug*, 1940 A.D. at 134, following *Bailey v. Geddes* [1938] 1 K.B. 156; [1937] 3 All E.R. 671; and see also section 127(2) of the Ordinances.

Where a pedestrian crossing has been established under the provisions of a by-law, the general attitude of the courts will be that the same degree of care will not be required of a foot passenger crossing thereat, as would be the case where he is crossing other portions of the street (*Passmore v. Koch*, 1946 A.D. 922 at 929), but such crossing does not entitle the pedestrian to use his right of way negligently and he may, in certain circumstances, be required to exercise due care and not to run diagonally across the cross-walk (*Selikman's case (supra)*). On the other hand a correspondingly greater degree of care is required of the driver of a car when he approaches such crossing. Even some distance away he must exercise due care for the pedestrian's safety and, on approaching the crossing, he must be all the more careful, for he knows that there the pedestrian has the right of way (*Passmore v. De Kock*, 1946 A.D. 922, following *Sparks v. E. Ash, Ltd.* [1943] 1 K.B. 223). Pedestrian crossings therefore do not give an **absolute right of way**, for neither party is entitled to ignore the presence of the other, and the pedestrian must still take care (*Norwich Union Fire Insurance Society, Ltd. v. Tutt*, 1960 (4) S.A. 851 (A.D.) at 854, and continued in 1962 (3) S.A. at 993). Thus in *R. v. Beaumont*, 1947 P.H., O. 19 (T), a motorist had stopped at a pedestrian crossing and allowed two pedestrians to cross, and then, seeing the crossing was clear, proceeded to move on. Just as he did so, however, he noticed a pedestrian **running** from the opposite side of the road, not on the crossing itself, but about a quarter way into the roadway. The man, on reaching the centre of the roadway, was then in the pedestrian crossing but did not stop and ran on into appellant's car. Held, that the appellant had been taken by surprise and that the conviction should be quashed. For other cases where it was found that the pedestrian had rushed across at the last moment, taking the driver completely by surprise, see: *Chisholm v. London Passenger Transport Bd.* [1938] 4 All E.R. 850 (A.C.); *Knight v. Sampson* [1938] 3 All E.R. 309 (K.B.), and *Sparks v. Edward Nash, Ltd.* [1943] 1 All E.R. 1 (C.A.).

In South Africa most of the pedestrian crossings are now guarded by traffic lights.

7. CREST OF HILL

Closely allied to the obligation to be careful in rounding a blind corner is the obligation to display care in approaching the crest of a rise or hill when the approach of other vehicles, which might possibly be on the wrong side of the road, is to be anticipated (*R. v. Venter*, 1959 (2) S.A. 520 (E)).

The various Provincial Ordinances provide that no driver of a motor vehicle shall pass or attempt to pass any other vehicle on a bend, corner or turning or hill crest until he has a clear view of approaching traffic and is satisfied that the roadway is sufficiently clear to permit of his so doing (section 109(4)). It is submitted, then, that the driver of a car who has an accident with another vehicle in circumstances prohibited by the terms of this provision, may be regarded as *prima facie* negligent. As to what constitutes a blind rise, see *S. v. Santos*, 1962 (1) S.A. 369 (N). It means a place where a vehicle over a summit and beyond the rise is not visible to a driver travelling up the rise. The connotation of the term cannot be confined to places where there is an apex or peak, i.e. where there is an incline on the one side or a decline on the other, but can include places where the road levels out after the incline.

In *R. v. Zuker*, 1934 E.D.L. 269, the accused was breasting a rise which concealed the view of the users of the road coming up the rise from the opposite direction. On reaching the top he came into view of the complainant, who was then on his correct side of the road, the accused being on his incorrect side. Both swerved simultaneously and collided. On appeal it was held that the accused had been rightly convicted of causing complainant's injuries in contravention of section 2 of Act 13 of 1886 (Cape). For a civil action on the same facts, see *Swart v. Albertyn*, 1935 C.P.D. 71. Per Gardiner J.:

'But a driver might only do this [drive on the wrong side of the road] when his view of the road in front of him was such that he could see a vehicle approaching him in time to get to his left. He must not drive on the wrong side when there is a hidden danger and another vehicle might suddenly come into view too late to avoid an accident.'

In any case, for the driver's own sake, he should approach the crest of a hill, especially if the road is strange to him, with considerable care for, apart from the possibility of there being cattle or sheep or obstructions in the road (see *Venter's case*, *infra*), there is also the possibility that the road may take a sudden and unexpected turn to the right or to the left just after the rise, and this danger is accentuated when driving at night. An accident befell the defendant in these circumstances in the case of *Botha N.O. v. Tunbridge N.O.*, 1933 E.D.L. 95, though, on the evidence, the Court held that the plaintiff had failed to make out a case of negligence against the defendant. In this case defendant was driving at night and came to the top of a rise where the road took a sudden turn to the right. This was a dangerous corner for those who were not acquainted with the locality, because the road falls away out of the beams of light shed by one's lamps, and suddenly disappears. Defendant's car struck the stones to the side of the road and capsized. Plaintiff, being unable to establish the fact that defendant approached the rise at an excessive speed, then sought to apply the *res ipsa loquitur* rule, but the Court held that the burden of proof lies on the plaintiff of proving negligence and that this burden had not been dis-

charged. See also *R. v. De Beer*, 1940 E.D.L. 248, where it was ruled that the driver should keep to his left as much as possible if, in addition to the road leading over the crest of a hill, it also made a sharp turn to the left.

In *R. v. Venter*, 1959 (2) S.A. 520 (E), the accused had approached a blind rise on a national road at midday at a speed of 65 m.p.h. and collided with a flock of sheep on the other side of the rise and here it was decided that the presence of such sheep was not such a contingency as ought not to have been anticipated or expected by him. See also *Swart v. Albertyn*, 1935 C.P.D. 71, but compare *ante*, p. 217.

In *R. v. Mahametza*, 1941 A.D. 83, Curlewis J.A. characterized the act of overtaking a car on the crest of a hill as sheer recklessness meriting imprisonment without the option of a fine.

8. LEVEL CROSSINGS

Since the train always has the preferent right of way, it behoves the motorist to be extremely careful in approaching localities where it is apparent that the road on which he is travelling is about to be crossed by a railway line. His primary duty is to keep a sharp look-out (*S.A.R. v. Stegmann*, 1932 A.D. 318, and *S.A.R. & H. v. Acutt & Worthington*, 1935 N.P.D. 314). Per De Villiers C.J. in *Union Govt. v. Buur*, 1914 A.D. 273:

‘It is the duty of a man approaching a level crossing always to **look**, often to **listen** and sometimes to **stop**. His exact duty depends largely upon the physical nature of his surroundings. There is no need to **stop** where his senses of sight and hearing satisfy him that he is not within the danger zone of any approaching train, and where it is clear that those senses cannot be mistaken.’

See also *Cason v. S.A.S. & H.*, 1966 (1) S.A. 842 (A.D.).

If therefore a person is unable to get a clear view of the crossing because of the sun in his eyes, he should stop and listen carefully (*S.A.R. v. Hall*, 1929 T.P.D. 936). (See *ante*, p. 305.) This rule also applies where a vehicle driver is driving in a dense fog (*De Vaal v. S.A.S. & H.*, 1965 (1) S.A. 402 (A.D.)).

A driver of a vehicle is not entitled to assume that, because a train has just passed a level crossing, it is therefore safe to cross the line without paying any further heed to the line, and a driver who crosses a line in these circumstances and is struck, owing to his failure to look and listen, by a second train closely following the train which has just passed, is guilty of negligence (*R. v. Lombard*, 1936 T.P.D. 89).

It is not proposed to deal in this chapter with the various decisions relating to the respective liabilities of the parties in railway-crossing collisions, that aspect being more appropriate to the part of this work dealing with ‘Trains’ (see *post*, pp. 465–81).

9. GRAVEL, SAND AND MUD

Where the condition of the road is such that, owing to the presence of gravel, sand or mud on the surface, it is obvious that the driver will experience considerable difficulty in maintaining a straight course on that part of the road, then he should, both for his own safety and for the safety of others, exercise greater care in passing over it. See *R. v. Shurrie*, 1941 T.P.D. (J/C 131/41); *Baigi v. Potgieter*, 1939 T.P.D. (J/C 70/39); *Herbert v. Miller*, 1935 P.H., O. 17 (C); *Dreyer v. National Motors (Pty.) Ltd.*,

1936 T.P.D. (J/C 442/36); *R. v. White*, 1940 P.H., O. 8 (O), the facts of which are set forth *post*, p. 384.

In *Herbert v. Miller*, 1935 P.H., O. 17 (C), the Court decided that if it had been apparent that it would be dangerous to drive with the right wheels of the car through a patch of loose sand in the middle of the road, it would have been defendant's duty to have avoided the middle of the road or, if he could not have done that, to have slowed down. Certainly, to travel through sand or mud at high speed is a risky thing to do, for it is much easier to skid on a greasy surface when going quickly (*Baumann's Selected Products v. Porter*, 1934 C.P.D. 383), and the danger is increased when the driver is passing other traffic (*ibid.*). The position of the driver of a vehicle in approaching a part where there was, to his knowledge, an amount of gravel and loose rubble on the bend of the road is illustrated in the dictum of Tindall J. in *Dreyer v. National Motors (Pty.) Ltd.*, 1936 T.P.D. (J/C 442/36):

'The evidence shows that it was dark, and the road was damp. According to the defendant's own evidence, when taking the outward bends the lights were thrown off the road. The defendant was travelling near the edge of the road. He stated that he got to the edge of the road because his lights did not clearly show up the road, and that by going near the edge of the road he got on to the loose rubble, which caused him to skid. It seems to me that the conditions under which he was driving were such that a reasonably careful driver, driving under those conditions, would not only drive slowly, but would drive very slowly, and would take care to see that he did not skid—or, at any rate, would keep a sufficient distance from the edge of the road. There is no evidence that there was any oncoming traffic. Though that is so I agree that it was the defendant's duty to contemplate the possibility of oncoming traffic coming round the bend. If it was necessary for him to keep to the left-hand edge of the road in going round the bend then he should have taken the utmost care in taking the bend so near the edge under the conditions which I have mentioned. It seems to me that a reasonably careful driver, under such circumstances, would exercise great care and would drive very slowly. . . . Having regard to the conditions it seems to me it was his business either to drive so slowly that he made quite sure that he did not skid, or to keep further away from the edge of the road. This road was known to the defendant. That being so it seems to me that the defendant might reasonably have been expected to have realized that at any time he might come upon some portion of the road where the surface was loose, and I think that he ought to have gone at such speed as to be absolutely safe at the dangerous place. For these reasons I have come to the conclusion that the magistrate's judgment on the question of negligence was correct.'

Even where the driver has not been negligent in using a portion of a road under circumstances where the car may skid or get out of control, he may nevertheless be found to be guilty of negligence in failing to **correct** that skid (*Baumann's Selected Products v. Porter* (*supra*) and *ante*, p. 336). It seems that the courts will not go so far as to hold that it is negligence per se to travel on a road where the nature of the surface is such that slipping is likely, but merely that, under these conditions, the driver should in the circumstances exercise greater care (*Wing v. London General Omnibus Co.* [1909] 2 K.B. 652).

On a narrow, muddy road, particularly where loose rubble has been placed in isolated patches, a skid may easily occur at low speeds without any negligence on the part of the driver (*Reich v. Westland*, 1940 S.R. 238). On the other hand, where the onus is on the driver, his explanation, without evidence, to show that at the spot in question a skid could not

have been avoided or corrected, is insufficient (*Boam v. Sydney Clow & Co.*, 1939 T.P.D. (J/C 34/39)). (See *ante*, pp. 335-9.)

10. CORRUGATIONS

Corrugations on the surface of the road are apt to affect the even tenor of the progression of a motor vehicle, and it is a well-known fact that, in order to obviate the great discomfort to the driver and his passengers, it is necessary to travel over them at a fairly high speed. At that speed, however, a certain amount of 'side slip' is likely to be encountered, and the driver should be prepared for this eventuality (*R. v. White*, 1940 P.H., O. 8 (O)). In this case the accused, travelling on a badly corrugated road, endeavoured to pass between two motor-cars standing 10 yards apart on opposite sides of the road. He reduced his speed from 40 m.p.h. to 28 m.p.h. and, in so doing, skidded towards one of the cars where two people were standing talking to the occupants therein and knocked them down. Held, that he was guilty of driving at a speed dangerous to the public, having regard to all the circumstances of the case, in that it was his duty to reduce his speed to below skidding speed before he reached those cars.

11. ONE-WAY-TRAFFIC STREETS

The authorities in most of the larger towns of the Republic have declared certain streets to be what is commonly termed 'one-way-traffic' streets, which, as the term indicates, is open to traffic proceeding one way only. It is made a criminal offence to proceed up a street where the street sign at the entrance indicates clearly that it is available only for traffic coming in the opposite direction. Whether it is negligent per se to travel in a contrary direction to that indicated ought, it is submitted, to be determined by the rules laid down regarding the accepted duty of traffic to keep to the left of the road (see *ante*, pp. 352-8). It is submitted, therefore, that while it is not per se negligence to proceed against oncoming traffic in a one-way street, yet the driver should exercise very great care, and should an accident happen he will, in the absence of any evidence to indicate to what causes the accident is attributable, be held to be prima facie guilty of negligence.

One-way streets may, therefore, be equated, in some measure, with highways divided by grass strips and, in this regard, it can well be negligence of so unexpected and unusual a character that the defendant could not be expected to guard against it (*Taljaard N.O. v. Potgieter*, 1964 (4) S.A. 613 (A.D.) at 616).

The driver in a **main street**, however, is under no duty to take care in avoiding a collision with the driver who is driving in the wrong direction in the one-way street until the former becomes aware of his presence. Therefore, until the driver in the main street **sees** the delinquent he is under no duty to bear in mind the possibility of his presence (*Prinsloo v. Pauley*, 1946 A.D. 518).

12. DRIFTS AND FLOODED STREAMS

Whether a driver would be regarded as having been negligent in attempting to cross a flooded stream at night will depend on (a) his knowledge of the ford in question; (b) his experience, and (c) his knowledge of his car (*Stride v. Reddin*, 1944 A.D. 162). Per Watermeyer C.J.:

'Among such risks, that of having to drive through water would, in that part of the country where thunderstorms are prevalent, also be one which might be encountered. What precautions the defendant as a reasonable man should have taken when he had to drive through water would depend upon his skill and knowledge. For example, it might not be reasonable for a driver, with no experience at all of crossing flooded streams and no knowledge of the depth of the water or of what the road surface was like under the water to drive a car into a flooded stream. But the position would be different with an experienced driver who knows his road and knows whether he can go through in safety. In this case the driver was said to be experienced, and he knew the road conditions.'

13. SHADOWS ON THE ROAD

Where there are shadows on the road, then there is an increased obligation upon the driver of a vehicle to keep a very keen look-out by reason of the fact that these shadows may conceal pedestrians, obstructions or excavations (*Langenveld v. Parsons*, 1924 T.P.D. 414). It has consequently been ruled that to drive a horse and unlit cart on a main country road on a moonlit night where a hill casts a shadow over the road was contributory negligence disentitling plaintiff to damages (*Blaiberg v. Kleynhans*, 1938 C.P.D. 305). On the other hand the presence of occasional shadows may sometimes exonerate the driver from having failed to see an obstruction, particularly where there are other matters occupying his attention, as happened in the case of *Hodgson v. Hauptfleisch*, 1947 (2) S.A. 98 (C) at 109.

14. STOPPING OR PARKING VEHICLES ON HIGHWAYS

Certain stringent statutory provisions are now embodied in the various provincial ordinances regulating the specific spots and places where it is unlawful for a motorist to stop or park his vehicle at all. Section 115 of the Ordinances provides as follows:

Except in order to avoid an accident, or in compliance with a road traffic sign or with the direction given by a police officer or for any cause beyond the control of the driver, no person shall stop a vehicle on the roadway of a public road:

- (a) alongside or opposite an excavation or obstruction on the public road if other traffic would be obstructed or endangered by such stopping;
- (b) within any tunnel or subway or on any bridge or within twenty feet of any tunnel, subway or bridge;
- (c) in or within twenty feet of the beginning or end of any part of such roadway where the normal width thereof has for any reason been constricted;
- (d) in contravention of a road traffic sign;
- (e) on the right-hand side thereof facing oncoming traffic;
- (f) alongside or opposite any other vehicle on such roadway, where such roadway is less than thirty feet wide;
- (g) within the railway reserve at a level crossing; or
- (h) in any other place where the stopping of the vehicle would or would be likely to constitute a danger or an obstruction to other traffic.

An accused cannot be convicted of the above offences unless the evidence discloses that he voluntarily stopped his vehicle in the prohibited place (*R. v. Olivier*, 1950 (3) S.A. 763 (N)), and where a motorist parks his car altogether off the tarmac, although still on the gravel part of the roadway, he would not ordinarily be constituting an 'obstruction' (*R. v. Rezak*, 1961 (2) S.A. 642 (C)). But if he can stop on the gravel, without intruding on the tarred part of the road (in order to mend a puncture), he

should do so (*S. v. Moatshe*, 1962 (3) S.A. 699 (T)). Here he was found guilty of creating an obstruction. See also *S. v. Sassen*, 1965 (1) S.A. 670 (T).

For a case where a motorist had been found contributorily negligent for stopping his car on the verge of a highway with his wheels only one foot from the left of the tarmac, and with his rear lights on, see *Pretorius v. South British Insurance Co., Ltd.*, 1963 (3) S.A. 8 (W). Here it was held that the statutory provisions do not alter the common law of negligence. See also *John Williams Motors v. Minister of Defence*, 1965 (3) S.A. 729 (O) at 731, and 1966 (3) S.A. 27 (A.D.).

15. PARKING AREAS

(a) APPROACHING

A motorist approaching an area where cars are parked cannot reasonably be expected to anticipate the emergence, without warning, of a pedestrian or vehicle from the line of cars so drawn up at the side of the road (*Kottler v. Jordaan*, 1930 T.P.D. 828, and *Mackay & Norval v. Bath*, 1933 P.H., O. 4 (T)), but he should be prepared for such action and, when passing a place where a car is parked, ought to keep a proper look-out for any signals given in indication that the parked car is about to pull off (*R. v. J. Wolff*, T.P.D. 26.4.1937) (unreported). In this case the complainant indicated with his right hand that he was going to move out and began to proceed slowly, but the accused did not see the signal or the manoeuvre and collided with him. Held, that he had rightly been convicted of negligent driving. See also *R. v. Damonse*, 1947 P.H., O. 29 (C). Much depends upon whether the vehicle is parked parallel to the kerb or diagonally to it. In the latter instance no sort of signal of intention to emanate from the line of parked vehicles can be effective and the approaching driver should, if he can, for his own safety, allow some berth between him and the line of parked cars in view of the possibility of one of them intruding into his way without keeping a proper look-out.

But where a child ran across a road from behind a parked car, giving the accused a view of her for 15 feet, or only one second, before he collided with her, the Court decided that he had not been culpable in failing to keep a proper look-out (*R. v. Cimme*, 1938 P.H., O. 53 (T)).

(b) MOVING INTO

In manoeuvring his car into a space allocated for parking it is only common sense that the driver should leave sufficient space between his car and the next, that his car should be parallel to the others, that in arriving or leaving he should not damage his neighbour's, and that he should not leave his car in such a position that part of it is left projecting out beyond the others and into the line of traffic. No authority can be quoted for these propositions, but it seems logical and possible that a non-observance of same would ground an action for damages for negligence. Merely to park one's car on the wrong side of the road, while prohibited by statute, is not itself negligence unless the position of the car constitutes a danger to other vehicles (*Matthews v. Schechter*, 1925 C.P.D. 183; *Keen v. Swale*, 1927 P.H., J. 21 (N), and *R. v. Rosenthal*, 1938 N.P.D. 432).

In *Calder v. Simon*, 1942 A.D. 337, the facts showed that while defendant was reversing his car into a parking space, the plaintiff, without looking where she was going, stepped off the pavement and was struck by the car. Held, that as she had been guilty of contributory negligence, the application for leave to appeal should be refused.

(c) LEAVING

A driver on moving off from a parking area should do so with the greatest regard to oncoming vehicles, and it is his duty to see that everything is safe before emerging into the line of traffic (*Bell v. Minister of Economic Affairs*, 1966 (1) S.A. 251 (N) at 256-7; *Zaymes v. Faros & Co. (Pty.) Ltd.*, 1940 C.P.D. 474, and *R. v. Fig*, 1933 P.H., O. 7 (C)). In the latter case it was held that it is not sufficient merely to put out one's hand, but that one should make certain that one can emerge from the line of cars without damage to others. Where, therefore, a car, being stationary on the side of the street, turns into the street almost at right angles, it is not sufficient for the driver of the car to hoot and signal with his hand. It is also his duty to **look out and see** whether he will obstruct oncoming traffic, and, if he fails to look out, he is negligent and will be liable in damages if a collision takes place owing to his failure to take care (*Barendse v. Smith*, 1923 E.D.L. 269; *Woods v. Administrator, Transvaal*, 1960 (1) S.A. 314 (T); *R. v. Faburichi*, 1958 (3) S.A. 802 (S.R.) at 803. See also *Montgomery v. Hulston*, 1917 A.D. 183, and *Du Toit N.O. v. Volks*, 1938 P.H., O. 3 (C)). Contrariwise, even if the driver does look behind him, it is also his duty (if parallel-parked) to give a clear signal of his intention to move out into the line of moving traffic in order to notify any driver, who is behind him and who also intends to leave his parking place, to be aware of his intention (*Bell v. Minister of Economic Affairs (supra)* at 256-7). Where, however, a driver emerged from a parking space at 4 m.p.h. and had travelled another 22 feet after getting out into the line of traffic before the collision occurred, the Court rightly allowed the appeal against his conviction (*R. v. Venter*, 1940 P.H., O. 5 (O)).

It is the duty of the driver of a vehicle, before he sets it in motion, to see that he will not do any damage to others lawfully on the roadway. This duty is not limited to persons or objects in front of the vehicle, but it extends also to those at the sides, or at all events at the driver's side. This duty is intensified when there are projections from the vehicle which make it possible that, though parts of the vehicle may be moved safely, other parts of it, or projections from it, may collide with persons or objects in the roadway (*Zaymes v. Faros & Co. (Pty.) Ltd.*, 1940 C.P.D. 474). In this case the driver of a lorry, parked next to the plaintiff's van, commenced to move off without looking round to see that all was clear. At that moment plaintiff had opened the door of his van in order to enter it and had his thumb crushed between the door and defendant's lorry. Held, he was entitled to damages. (See also *ante*, p. 348.)

In *R. v. Grobler*, 1936 O.P.D. (J/C 29/36), the accused had endeavoured to reverse his car out of a parking position across the road and had collided with the complainant in the process. He was convicted for negligent driving. Per Fisher J.:

'It is argued that the accused had a right to back as he did, and within certain limitations that may be so, but in order to ascertain what is reasonable one must

bear in mind these limitations because the accused was then propelling his car in a manner which debarred him from exercising that control and observation which one is entitled to expect from anyone driving a car under ordinary circumstances. It is therefore incumbent upon him to exercise that particular care due under the given circumstances. One is impressed by the fact that a bare glance must have conveyed to the accused the fact that this traffic was approaching and that therefore it thereupon became incumbent upon him to exercise his right to the road with due regard to the right of those who were approaching on the road on their proper side. . . . Under those circumstances it was his duty to exercise what would be reasonably expected from any man having to act under those circumstances, which was either to satisfy himself that the other car had stopped or to take measures to avoid such car. Until he had so satisfied himself he had no right to go on backing with the knowledge of the oncoming traffic.'

Statutory provisions

The various provincial ordinances contain a provision making it unlawful to park in certain places. The definition of 'park' means keeping a vehicle, whether occupied or not, stationary for a period of time greater than is reasonably necessary for the actual loading or unloading of persons or goods, but does not include any such keeping of a vehicle by reason of a cause beyond the control of the person in charge thereof (section 1). Obviously the period of time involved or required depends on the particular circumstances of each case (*S. v. Kruger*, 1968 (2) S.A. 638 (C)). In this regard it has been held that, where three passengers from a theatre mounted the accused's vehicle immediately and the driver waited another five minutes for the other two passengers to arrive and mount, no offence had been committed (*R. v. Dick*, 1961 (1) P.H., O. 2 (N)). But where bags of mealies had fallen off a lorry and the driver, fearing that others might also fall off, had gone for assistance in picking up the fallen bags, it was held that he had parked in contravention of the statute (*S. v. Sassen*, 1965 (1) S.A. 670 (T)). Today, however, this might be considered as a circumstance beyond the control of the driver. Moreover, the size of the goods, whether large or small (when being delivered or picked up) is immaterial: Consequently, where the accused had stopped in order to deliver two packets of yeast, it was held that he had not 'parked' in contravention of the statutory provisions concerned (*S. v. Akoo*, 1969 (1) S.A. 567 (N)). The definition of 'park' has however no application where the driver is charged with having stopped unlawfully in terms of section 115 of the Ordinance. (See *ante*, p. 385, *R. v. Andrew*, 1948 (2) S.A. 446 (N).)

Before a conviction may competently ensue for unlawful parking it is not sufficient for the State to establish that the accused parked in a yellow line, for there must be evidence that it conforms to the specifications prescribed by regulation, namely that a notice of 'No Parking' was exhibited in letters 4 inches wide (*S. v. Akoo*, 1969 (1) S.A. 567 (N)).

Section 116 of the provincial Ordinances now provide, in effect, that no person shall park a vehicle on a public road:

- (a) in contravention of any road traffic sign;
- (b) in any place where he is not permitted to stop (see *ante*, p. 385);
- (c) alongside a properly demarcated fire hydrant;
- (d) in any place where his vehicle would obscure any road traffic sign;
- (e) in any manner as would encroach on a sidewalk;
- (f) in such a manner as would obstruct any private or public entrance

- to such road (but this would surely not apply to a person's obstructing his own private entrance to the road);
- (g) if within an urban area, (i) within 30 feet of a pedestrian crossing, (ii) within 15 feet of any intersection, (iii) upon or over the actuating mechanism of a robot (whatever that may mean) or (iv) with the left-hand vehicle more than 18 inches from the edge of the road;
 - (h) if outside an urban area, on the roadway or within 3 feet of the edge of the road except in a demarcated parking place.

In this regard it should be noted that, under the common law, to park a vehicle partly on the tarmac of a road and partly off it is not in itself negligence (*Pretorius v. South British Insurance Co., Ltd.*, 1963 (3) S.A. 8 (W), and *John Williams Motors, Ltd. v. Minister of Defence*, 1965 (3) S.A. 729 (O) at 731).

Presumption. Section 155 of the Ordinances provides that in any prosecution under the ordinances it shall be presumed, until the contrary is proved, that the vehicle in question was driven by the owner thereof.

Exemptions. The aforementioned provisions relating to stopping and parking do not apply in respect of an ambulance, a fire-engine or a vehicle used by a police officer in the execution of his duty or a vehicle used in the construction or maintenance of a public road or the supply of electricity or water or any other essential public service if such service cannot be performed without infringing these provisions (section 117).

16. EXCAVATIONS

While it is the duty of the driver to avoid all obstacles, his position in regard to excavations is somewhat different, for he is entitled to assume that the party causing the hole or excavation will provide adequate warning of the danger (*Volksrust Municipality v. Adendorff*, 1922 T.P.D. 212). Per Wessels J.P.:

'It seems to me that there is a wide difference between a person who runs into an object which is lawfully on the street, an object which stands out and is silhouetted against a background, and a person who runs into a **trap**. An excavation in the street, that is deliberately made, is not such a thing as one would keep a look-out for. When one is travelling in a street it is one's duty to look out all the way for such things as are usually found on streets, such as pedestrians, horsemen, or even a motor-cycle that is standing on the street, and being repaired for the time being, whether it has a light or no light. These are objects you expect when travelling along a street, but you do not expect an excavation under your feet.'

See also *Kinnear v. Transvaal Administration*, 1928 T.P.D. 133, and *Finlayson v. Johannesburg Municipality*, 1925 W.L.D. 208.

It has, consequently, been decided that to drive through a street, the width of which has been greatly reduced by excavations, at a speed of 53 miles per hour is gross negligence (*R. v. Brick*, 1938 E.D.L. 71).

17. SCHOOLS

The driver of a vehicle who is passing a school should be particularly careful since he knows that young children are likely to be about, or emerging from the school grounds into the roadway, and should foresee that they might attempt to cross the road in front of him (*Borean N.O.*

v. *Shield Insurance Co., Ltd.*, 1967 (3) S.A. 701 (C)). He is, therefore, under a duty to watch carefully not only the side of the road upon which he is travelling and the road in front of him, but also the opposite side of the road where the school is situated and from where a child might emerge (*Adams v. Sunshine Bakeries, Ltd.*, 1939 C.P.D. 72).

Whether the driver of a motor-car should also be prepared for the sudden emergence of a child from behind several cars parked near a school was discussed in *R. v. Robilliard*, 1939 E.D.L. 241. Here it was decided that he could not have appreciated or foreseen this contingency. It is submitted, however, that this decision is not correct, since the warning notice to motorists, 'School', should have put him on his guard against such events as did in fact occur. Compare *S. v. Kee*, 1961 (4) S.A. 3 (E).

18. CONVERGING DOUBLE LANES

When a road, in which there are two lanes which narrow down into a single lane for traffic, it is the duty of a motorist in the one lane to give way to another motorist in the other lane if the latter is slightly in front of him even though that motorist may be only a few feet ahead: A failure to do so and thus to compel the motorist ahead to give way, is negligent driving (*R. v. Vosconcelos*, 1966 (3) S.A. 683 (R.A.D.)).

19. REVERSING

A motorist who is reversing his vehicle out of a garage drive-way across a pavement into a street, in which there are stationary cars parked on the same side as cars which may be approaching, must realize that such cars constitute a visual obstacle both to him and to the driver of an oncoming car and he must, therefore, regulate his conduct accordingly. A greater degree of fault attaches to such reversing motorist than to the driver proceeding along the street but who keeps a look-out for such reversing car (*Venter v. Dickson*, 1965 (4) S.A. 22 (E)).

A person who reverses into the path of an oncoming car ought to foresee that, in taking violent action to avoid a collision, the brakes of that car might fail if applied with great vigour. In such a case, the failure of the braking system is not an independent cause but one attributable to the reversing motorist (*Smit v. General Accident Fire and Life Assurance Co.*, 1964 (3) S.A. 739 (C) at 743).

As to the defendant's exemption from liability while acting under the instructions of the plaintiff of his foreman, see *Yenkelowitz v. Vavruska*, 1965 (3) S.A. 550 (C). Here it was held that the defendant would be liable only if he failed to observe, to the best of his ability, the plaintiff's servant's instructions but (*semble*) if he realizes that such instructions or directions will result in causing damage then he should cease to follow them. Without such observer's instructions however a reasonable and prudent driver, who intends to reverse out of his garage or backyard, should not do so until he has assured himself that he can do so with safety, and this is particularly so where there are young children playing in close proximity to his line of travel (*S. v. Lalla*, 1964 (4) S.A. 320 (N)). Nor should he reverse after stopping at a robot light without making sure that he is able to do so with safety (*Watt v. Western Assurance Co.*, 1952 (3) S.A. 778 (W)).

To reverse slowly on a highway, however, may constitute negligence in

the abstract but would not attract *culpa* where a cyclist foolishly collided with the rear of his vehicle by swerving needlessly into the reversing car (*Von Buren v. Minister for Defence*, 1947 (1) P.H., O. 22 (D)). In *R. v. Anthonie*, 1929 O.P.D. 78, the conviction of the motorist was quashed where he had reversed down a narrow lane at 4 to 6 m.p.h. into an old lady who had seen and heard the sound of his hooter but nevertheless advanced across the path of the emerging car. See also *Calder v. Simon*, 1942 A.D. 337. In *R. v. Breytenbach*, 1943 C.P.D. 233, the conviction was also set aside where the driver of a lorry had backed into a store, had bumped into another vehicle standing there and injured the deceased who was standing nearby when there was a boy specially appointed to guide lorries in and to direct them when to stop, the Court holding that this was not one of the cases where the ordinary rule to look out applied. The reversing driver must, however, keep a good look-out, even when reversing down a garage ramp, and his failure to do so will entail culpability (*Frodsham v. Aetna Insurance Co.*, 1959 (2) S.A. 271 (A.D.)). See also *Smit v. General Accident Fire & Life Assurance Co.*, 1964 (3) S.A. 739 (C).

CHAPTER XVIII

CONDITIONS WHEN DRIVING

SUMMARY

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The obligation resting on the driver of a vehicle to exercise a greater degree of concentration, whilst driving in conditions when accidents are more likely to occur, is a duty closely related to his carefulness regarding speed, look-out and control generally, but, in view of the importance of the topic as a whole it has been deemed expedient to treat the subject under a separate chapter. The time when a greater degree of diligence and care may be expected of a driver is when he is driving (1) at night, (2) in rain or mist, and (3) in dust and wind.

1. AT NIGHT

(a) POSSIBLE EVENTUALITIES

That there is an appreciable difference between driving at night and driving in daylight is the experience of all, since at night-time one's visibility is limited by the focus and power of one's headlights. Invisible objects may loom up before one with such startling unexpectedness as to cause one to lose one's nerve: as happened to the defendant in the case of *Haylett v. Steen*, 1936 P.H., O. 5 (T), or the focus of one's headlights may, on rounding a bend, leave the road which one is about to traverse in total darkness, causing one to leave the road and capsize (*Botha v. Tunbridge*, 1933 E.D.L. 95). Again there may be unexpected excavations in the road surface in the driver's way which the headlights of ordinary and reasonable strength may not show up in time for him to pull up (*Kinnear v. Transvaal Provincial Administration*, 1928 T.P.D. 133), or one may suddenly come on to a railway crossing where there is a train without lights (*Joubert v. S.A.R.*, 1930 T.P.D. 154), or which is not giving adequate warning of its

approach by whistling (*Smart v. S.A.R.*, 1928 N.P.D. 129), or, although travelling slowly, one may not be able to see a pedestrian in sufficient time to pull up (*R. v. Botha*, 1937 P.H., O. 1 (N)); *R. v. Wells*, 1949 (3) S.A. 83 (A.D.)), or one may suddenly come across an unlighted obstruction (*R. v. Beck*, 1937 P.H., O. 25 (C)), or sheep lying on the road (*Cromhout & Dewing v. Green*, 1942 E.D.L. 238), or a cow in the way (*Tomlinson v. Anderson*, 1949 P.H., O. 18 (T)), or a person, previously masked from view by a discerned object, may suddenly emerge, as in *Cowan v. Ballam* 1945 A.D. 81.

Perhaps more accidents occur at **twilight** than at any other time, for in the dusk before darkness it is found that the efficiency of one's headlights is poor while the amount of vanishing daylight, available to indicate objects and obstructions on the road is totally inadequate for the driver's needs (*Makou v. Williams*, 1936 P.H., O. 30 (T)). In most of the municipalities and provinces it is an offence to travel at any time between half an hour after sunset to half an hour before sunrise without one's headlights burning efficiently.

(b) SPEED AND VISIBILITY

The closest correlation should be maintained between the speed travelled and the distance one is able to see in front of one's car, for in all cases of night-driving the golden rule is that **the driver's speed must be so regulated as to enable him to pull up and stop within the range of his vision** (*Thornton v. Fismer*, 1928 A.D. 398; *R. v. Cooper*, 1938 N.P.D. 172; *S.A.R. v. Acutt & Worthington*, 1935 N.P.D. 314), because there is 'an obvious relationship between speed and visibility' (*S. v. Van Deventer*, 1963 (2) S.A. 475 (A.D.) at 481), and a driver who fails in this respect may be deemed to be prima facie guilty of negligence (*R. v. Wells* (*supra*) at 88; *Manderson v. Century Insurance Co.*, 1951 (1) S.A. 533 (A.D.) at 537-8). Reason and common sense therefore dictate that a motorist should, at night, travel only at such a speed which will enable him to see in time to avoid any person or object lawfully upon the highway (*Blaiberg v. Kleynhans*, 1938 C.P.D. at 312). The very first requisite, therefore, of competent night-driving is to have **efficient lights**, since the driver of a motor-car at night-time ought to have lights sufficient to show up a pedestrian at a distance which will give him time to avoid a collision with him and he ought not to drive at such a pace that, when his lights reveal the pedestrian, the latter, standing in the street, cannot escape (*Tomlinson v. Anderson*, 1949 P.H., O. 18 (T); *Wagenaar v. Thomas*, 1930 W.L.D. 81). In the last-mentioned case the plaintiff, a municipal employee, was standing at night superintending Natives cleaning tram-lines in the middle of the street, with plenty of room for traffic on either side. Owing to rain that night, visibility was bad. Two motor-cars approached from the west. The leading one passed the group safely, but defendant, who was in the second car, accelerated and endeavoured to pass the leading car near the group by turning towards the centre of the street. He collided with plaintiff and injured him. Held, that he was liable in damages for his negligence in not seeing plaintiff. See also *R. v. Ekermans*, 1935 C.P.D. 32, and *Niehaus v. Worcester D.C.*, 1932 C.P.D. 53. This does not mean, however, that the person in charge, or owner, of a vehicle parked on the road without lights

can recover his full damages from the driver of a car which has collided with him, since an act of this character is a negligent one (*Manderson v. Century Insurance Co. (supra)*), and the owner will have to submit to an apportionment of damages.

The second requisite is that a driver should not travel at night at a **speed** which prevents him from pulling up within the range of his visibility (*McJannet v. Sun Insurance Office Ltd. and others*, 1967 (3) S.A. 159 (E)).

Inferences of fact—Driver's dilemma?

The dilemma is frequently posed that either the driver was not keeping a proper look-out, or he was travelling at a speed in excess of the range of his vision (see *ante*, pp. 308–9). In the past it has sometimes been regarded as a rule of law that a person travelling in the dark must be able to pull up within the range of his vision. But this statement was emphatically criticized by Lord Greene M.R. in *Morris v. Luton Corporation* [1946] 1 All E.R. 98. The accuracy of posing the dilemma as above indicated has also been called into serious question in our courts—see *Van Staden v. May*, 1940 W.L.D. 198; *R. v. Yssel*, 1945 T.P.D. at 241; *Hodgson v. Hauptfleisch*, 1947 (2) S.A. 98 (C), and *R. v. Heydenrich*, 1942 T.P.D. 307. Consequently, there is **no actual rule of law** posing such inescapable dilemma (*Sauerman and others v. New Zealand Insurance Co.*, 1958 (4) S.A. 289 (N) at 295; *R. v. Chee*, 1955 (1) S.A. 95 (S.R.) at 97; *S. v. Van Deventer*, 1963 (2) S.A. 475 (A.D.) at 481; *Bhyat's Store v. Van Rooyen*, 1961 (4) S.A. 59 (T) at 63). Provided that it be not so elevated to a rule of law, this so-called dilemma is, it is submitted, of considerable practical importance when applied in a proper case. It is incorrect to say that, because a collision occurs **at night**, the dilemma automatically applies. But there is a true dilemma whenever there can only be two possible **states of facts**, each of which, if a true one, establishes negligence. See *R. v. Du Toit*, 1947 (3) S.A. 141 (A.D.); *Manderson v. Century Insurance Co., Ltd.*, 1951 (1) S.A. 533 (A.D.) at 543; *Hoffman v. S.A.R. & H.*, 1955 (4) S.A. 476 (A.D.) at 478.

The result, legally speaking therefore is that a factual *prima facie* case may be set up calling for an answer, or evidential rebuttal by the defendant (or an accused) explaining how or why the collision took place without negligence on his part (*R. v. Gishion*, 1948 (2) S.A. 131 (T)) such as the invisible nature, in the circumstances, of the object or person collided with, or the suddenness with which the object loomed into view (*Hodgkiss v. Murray*, 1948 (3) S.A. 266 (E)). In *Manderson v. Century Insurance Co. (supra)*, it was held that the question, whether a driver had driven at a speed at which he is unable to pull up within the range of his vision, is one to be determined by the circumstances and locality in each particular case, for while a person must guard against the likelihood of danger he need not guard against the mere possibility of danger. Everything depends on the **colour** and **background** of the object and the light from other sources for, as Van den Heever J.A. pointed out (at 540), the obstruction may so blend in with the surrounding background as to excuse the driver for not having seen it in time. See, also, *Stewart v. Hancock* [1940] 2 All E.R. 428; *Byleveldt v. Coetzee*, 1953 (2) P.H., O. 9 (T); *Brakpan T.C. v. Moore*, 1947 (3) S.A. 97 (T); *Hoffman v. S.A.R. & H.*, 1955 (4) S.A. 476 (A.D.); *Heneke*

v. *Royal Insurance Co.*, 1954 (4) S.A. 606 (A.D.) at 613; *Baker v. Longhurst & Sons* [1933] 2 K.B. 461; *Hodgkiss v. Murray*, 1948 (3) S.A. 266 (E).

The conclusion, therefore, is that in determining whether a motorist, who has collided with an unlighted obstruction at night, was negligent, the ultimate issue always is whether the facts establish negligence; not whether they show that the driver in question failed to keep his speed within the range of his vision, although such failure in a particular case may be a crucial factor in deciding whether or not there was negligence. The generalization that speed should be related to the range of vision is, therefore, a potent argument to be considered in appropriate cases in determining the negligence of the driver concerned (*Hoffman v. S.A.R. & H.*, 1955 (4) S.A.), 476 (A.D.); *S. v. Van Deventer*, 1963 (2) S.A. 475 (A.D.) at 481), each case depending upon its own facts, regard always being had to the onus being upon the plaintiff (or the State) to establish that, under the particular circumstances the pedestrian or object was, or should have been, visible to an ordinary careful driver (*Hoffman's* case (*supra*) and *East London Municipality v. Van Zyl*, 1959 (2) S.A. 514 (E) at 519). See, also, *S. v. Jackhals*, 1961 (4) S.A. 573 (C), where there was an absence of proof that the reflectors of an unlighted parked vehicle should have been visible to the accused driver when his own headlights were momentarily dipped at the crucial moment just when other road-users had brightened their lights. (See *post*, p. 398.)

Thus in *Du Rand v. Labour Construction Company (Pty.) Ltd.*, 1969 (1) P.H., J. 6 (T), the Court, after referring to *Hoffman v. S.A.R. & H.* (*supra*), came to the conclusion that one of the factors to be taken into account, in determining the negligence of the driver who had collided with some white drums placed across the roadway at night, was that the driver's speed was such as to prevent him from stopping within the range of his vision.

(c) INVISIBLE OBJECTS

In determining the culpability or otherwise of the driver, regard will be had in every case to the degree of visibility of the object or person with which he collided. In some cases, owing to the structure, background, general lighting arrangements and the like, it would be quite unfair to hold a party guilty of carelessness in not seeing the object before he did.

Thus in the case of *S.A.R. v. Estate Saunders*, 1931 A.D. 276, the defendants had negligently left a trailer on the road after dark without lights and the driver of a bus, which was towing the plaintiff's bus, did not see it until he was close upon it. He, however, managed to swerve and avoid it, but the towed bus struck the trailer and was wrecked. The defendants pleaded contributory negligence, but the Court held that, as the trailer consisted merely of a horizontal body with no containing sides and supported on axles and wheels, it was, owing to its framework appearance and frail outline, extremely difficult to see, and gave judgment for the plaintiff accordingly. See also *Mallock v. Pan African Roadways*, 1949 P.H., O. 4 (S.R.), and *Hodgson v. Hauptfleisch*, 1947 (2) S.A. 98 (C).

In contrast to *Saunders's* case, however, see *R. v. Cooper*, 1938 N.P.D. at 174-5, where it was ruled that an **unlighted wagon** is an object which should be reasonably visible to a motorist with the aid of his headlights

(*sed quare*). A **tram-rail grinder**, on the other hand, is not such a visible object as to be discernible in time to pull up, and a failure to see same at night is not culpable (*Durban Corporation v. Milne*, 1939 N.P.D. 488). In this regard the peculiar circumstances of each case must be carefully considered, such as the visibility of the obstruction, its colour, the background upon which it stands, possible light from other sources, variations of light and shade and weather conditions (*Sauerman and others v. New Zealand Insurance Co., Ltd. and another*, 1958 (4) S.A. 289 (N)). In this case it was held that the driver had not been negligent in colliding with a stationary vehicle left without lights and without rear reflectors, since other drivers had also experienced difficulty in seeing it without being blinded by the lights of any oncoming car, as the driver had been at the time. Much, therefore depends on the amount of light on the road at the time, and the nature of the road itself. Where, therefore, the road is such (e.g. the Johannesburg–Pretoria main road) that no reasonable man ought to expect an unlighted vehicle thereon, no blame should attach to the driver in failing to see it in time (*R. v. Heydenrich*, 1942 T.P.D. 307). See also *Hill-Venning v. Bezant* [1950] 2 All E.R. 1151 (C.A.) for a collision with an unlighted motor cycle and where damages were apportioned.

Per Leon J. in *S. v. Voights*, 1968 (2) P.H., O. 32 (N):

‘Every driver driving on a highway should always keep a proper look out and should anticipate the presence of other vehicles on the road some of which might emerge suddenly, but the use of highways nowadays would become almost impossible if a driver were required to anticipate an unlighted vehicle which might have been left at night on the tarmac directly in his line of travel without any warning or indication whatsoever as to its presence there.’

See also *S. v. Jakhals*, 1961 (4) S.A. 573 (C) at 576, and *S. v. Bailey*, 1967 (2) S.A. 690 (N) at 693.

In terms of section 130 of the Ordinances it is an offence to place or abandon any vehicle or object on a public road in circumstances in which such vehicle or object may endanger or cause damage to traffic on the road. Such action would undoubtedly attract an apportionment of damages in the case of a collision.

In regard to the matter of lights to guide one as to the presence of an obstruction on the road it has, in many cases, been pointed out that one cannot expect a pedestrian, or a horse or a cow, to carry a light, and that a failure to see such objects in time would be negligence since one’s own headlights should be sufficient for the purpose (see *R. v. Malan*, 1946 T.P.D. 642; *ante*, pp. 304–8). Indeed, it cannot be argued that a reasonable motorist can never anticipate the presence of an unlighted obstruction in the road (*Byleveldt v. Coetzee*, 1953 (2) P.H., O. 9 (T)). On the other hand, such person, or animal, may be so camouflaged by the background as to render him (or it) virtually invisible. Thus, in *Cromhout & Dewing v. Green*, 1942 E.D.L. at 240, two motorists had run over certain sheep which had been lying on the roadway at night, and it was held that they should not be mulcted in damages since the colour of the sheep, after rolling in the sandy surface, so closely resembled the surface itself as not to be discernible to a driver travelling at a reasonable speed.

(d) LIGHTS FAILING

It is common sense that a motorist—if his lights fail or become extinguished—has no right to continue travelling on a public highway in total darkness. He should immediately pull up (*R. v. Pole*, 1941 T.P.D. 177). In this case the appellant had been travelling at 20 m.p.h. when his lights suddenly failed. He tried his switch and found it to be on, and then decided to draw up at the side of the road. He applied his brakes gently to slow down. The lights of an approaching car then revealed two persons about five yards in front of appellant, who swerved to his right but struck one of them. Held, that since the emergency was of his own making he had rightly been convicted.

(e) DIMMING

It was customary for motorists, when approaching each other at night courteously to dim their headlights in order that neither should be blinded when they were about to pass by. The obligation to dip or dim one's lights was a statutory duty in terms of some of the provincial Ordinances (see section 101(4) of Ordinance No. 26 of 1956 (N) and *Steenkamp v. Steyn*, 1944 A.D. 536 at 553), but the present Ordinances do not specifically make mention of this obligation, apart from section 139 which creates an offence for driving without reasonable consideration for other road-users. There must, however, be evidence to the effect that the other driver was actually inconvenienced by the accused's failure to dip his lights (*Joubert v. S.*, 1969 (1) P.H., H. (S.) 40 (T)). In any event it should be remembered that, when travelling with dimmed, or dipped, lights a driver's visibility is considerably reduced and the circumstances will then probably call for a considerable reduction of speed (*S. v. Van Deventer*, 1963 (2) S.A. 475 (A.D.) at 481). The case of *R. v. Beck*, 1937 P.H., O. 25 (C), is an example of what may happen under such contingencies. Here the accused was travelling along a road on a dark and misty night. He saw a car approaching him some distance off and dimmed his lights, when he suddenly saw an unlighted lorry in his way standing under some trees and crashed into it. He said that, with his lights dimmed, his range of vision was 15 yards, but that he only saw the lorry when it was about 8 yards away and that he was unable to avoid it as his speed was 30 m.p.h. Held, that the driver of a vehicle had to expect to see vehicles standing on the side of the road, and also animals on the road, and that it was his duty to drive at such a speed that he could draw up within the range of his vision. If the accused could see 15 yards ahead of him and failed to see the lorry until he was 8 yards from it, then he could not have been keeping a proper look-out. On the other hand, if he could see 15 yards and yet nevertheless could not avoid the accident, then he must have been travelling at too great a speed. See also *Ramatlo v. Kurland*, 1930 T.P.D. 435 (p. 438), and *Blaiberg v. Kleynhans*, 1938 C.P.D. 305; *R. v. Erasmus*, 1942 C.P.D. 169, and *R. v. Potgieter*, 1938 N.P.D. 272. See, however, *Hoffman v. S.A.R. & H.*, 1955 (4) S.A. 476 (A.D.), and *Hodgkiss v. Murray*, 1948 (3) S.A. 266 (E), where it was held that the suddenness with which the defendant was blinded, just when he should have seen an unlighted object, provided sufficient excuse.

In *R. v. Botha*, 1937 P.H., O. 1 (N), the accused was travelling at dusk at about 20 m.p.h., his headlights giving him a range of vision of about

16 feet. He took his eyes off the road for a moment or two to look at a passing train and when he looked to the road again he saw, and collided with, two Natives who were pushing a cart in the same direction. Here the Court held that he should have expected pedestrians to be on the road and should have been on the look-out for them, and that, in any case, to travel at the speed of 30 feet per second (i.e. 20 m.p.h.) when his visibility was limited to 16 feet was in itself negligence. See also *R. v. Cooper*, 1938 N.P.D. at 181.

Emergency. In *S. v. Naik*, 1969 (2) S.A. 231 (N), a driver had, on approaching a curve on the road, observed the bright headlights of another vehicle on the road ahead of him and, presuming that such lights were those of an approaching car, he dipped his lights. It was not until he was 50 yards away that he realized that the said lights were those of a car on the wrong side of the road when he reduced his speed to about 25 m.p.h. and swerved to his left on to the gravel portion of the road, but it was then too late to avoid a collision. Held, on appeal, that, since the dangerous position in which the appellant found himself was not of his own making, the State had failed to prove its allegation of negligence.

(f) LOOK-OUT AND DAZZLE

It is axiomatic that night travelling, presenting as it does contingencies which do not as a rule occur in day travelling, requires a greater degree of concentration and finer perception, and not only is this so, but it seems that the driver should be prepared for such eventualities as are likely and do, in fact, frequently occur and should also drive at a considerably reduced speed. Under this category may be placed the contingency of having one's vision interfered with by the lights of another car falling upon one's windscreen or upon the rear mirror of one's car. Thus it has been held that the fact that the lights of a car in the rear are shining on to the mirror does not entitle the driver to take his eyes off the road, for the purpose of looking at the mirror to turn it aside, if by so doing he fails to see a pedestrian in the way and, as a consequence, runs him down and kills him (*R. v. Naude*, 1936 P.H., O. 25 (C)). See also *R. v. St. Arnand*, 1933 P.H., O. 8 (C). Where, again, the appellant, on passing a car, found that his visibility was obscured by the lights of that car shining on his windscreen but nevertheless continued and, not observing a pedestrian, ran over him and killed him, the Court held that he had rightly been convicted of culpable homicide (*R. v. Freeman*, 1931 N.P.D. 460). (See also *ante*, pp. 305, 308.)

(g) PROOF

In criminal trials, and to a lesser degree in civil cases, where a failure to see the object or person collided with is an essential element constituting the alleged negligence of the accused or defendant, evidence should be available and placed before the court that the object or person was, in the circumstances of that particular case, one which should have been readily visible to the driver concerned (*R. v. Claude*, 1956 (1) P.H., O. 6 (C)). In other words, when visibility is bad owing to darkness and rain, it is incumbent upon the State to establish that the accused **ought to have seen** the person or object with whom he collided. Even when observations are made by the magistrate at a reconstruction of the incidents of the accident, due

allowance must be made for the element of surprise and also for the element of reaction time (*Steyn v. Nunes*, 1951 (3) S.A. 96 (T)). Consequently, in the absence of evidence of the lighting conditions and evidence showing that the object concerned ought to have been visible to the accused, he cannot be convicted of negligence for his failure to keep a proper look-out (*R. v. Yssel*, 1945 T.P.D. 235). In this regard the strength of the driver's headlights is a pertinent question (*R. v. Malan*, 1946 T.P.D. 642). In this case it was ruled that a motor-car, although bearing no lights, is nevertheless such an opaque object that it should have been visible to the driver with his own headlights, had they been of ordinary strength. See also *R. v. Cooper*, 1938 N.P.D. 172, and *Thornton v. Fisser* (post, pp. 418-20, and ante, p. 308). *R. v. Rosenthal*, 1948 (1) S.A. 51 (N); *Tomlinson v. Anderson*, 1949 P.H., O. 18 (T); *East London Municipality v. Van Zyl*, 1959 (2) S.A. 514 (E) at 519, and *S. v. Van Deventer*, 1963 (2) S.A. 475 (A.D.).

In *R. v. Abrahamson*, 1938 T.P.D. (J/C 227/38), the accused had been convicted of culpable homicide in running over a person lying prostrate in the road in an intoxicated condition. The accused admitted that he never saw the deceased. His lights were dipped and he had been travelling at dusk. The atmosphere was smoky and visibility poor. The deceased was wearing a drab suit which might easily have blended with the colour of the road. Held, that in the absence of evidence by the State that the deceased was **clearly visible** to the motorist under the circumstances, he ought to have been acquitted. For other decisions, wherein the courts have ruled that the allegations of carelessness had not been brought home against drivers who had collided with unlighted obstructions, see *Stewart v. Hancock* [1940] 2 All E.R. 427; *R. v. Heydenrich*, 1942 T.P.D. 307; *R. v. Du Plooy*, 1947 (1) A.S.A.R. 512, and *Hodgson v. Hauptfleisch*, 1947 (2) S.A. 98 (C).

2. IN RAIN OR MIST OR FOG

Where the climatic conditions are such as to limit one's usual range and accuracy of observation, special precautions should be taken (*R. v. Elford*, 1930 C.P.D. (J/C 56/1930)). Per Gardiner J.P.:

'It is said that the light on that night was bad for motoring. It was a moonlight night and the ordinary street lamps were not lit and there was a bit of haze. If there were these conditions, then again special precautions ought to have been taken by the motorist because if the condition of the weather is bad so as to render visibility difficult then the motorist must go at a slower pace so that he may have plenty of time to look out and see if there is anything to impede his progress. The worse the conditions for traffic, the more necessary is it to take precautions, and if the accused came at a speed which normally I suppose would not be excessive, 25 miles per hour, but in conditions under which he is unable to see clearly objects which might be in his path, it might have been faster than was proper.'

In certain circumstances it may be the grossest negligence, therefore, for a man to continue driving his car when he is unable to see on account of a damp windscreen (*R. v. Steena*, 1926 P.H., H. 48 (C); see also *R. v. Venter*, 1932 O.P.D. 147) or to drive at 35-40 m.p.h. when one's headlights are unnecessarily dipped (*R. v. Outram*, 1966 (3) S.A. 501 (T)), or where, owing to mist and darkness, the driver of a car is unable to see an approaching train (*Amalgamated Collieries v. Kloppe*, 1945 O.P.D. 109);

De Vaul v. S. A. R. & H., 1965 (1) S.A. 402 (T) at 407)). Here the mist on the celluloid windscreen of the driver prevented him from seeing properly (at 411). It has been held in one case that to travel at 20 m.p.h. in drizzly weather is not necessarily negligence (*R. v. Higgs*, 1930 E.D.L. 239), while in *Henneke v. Royal Insurance Co.*, 1954 (4) S.A. 606 (A.D.), the Court decided that where a person travelled at 20 m.p.h. in a ground mist and where he saw plaintiff for the first time when the latter was only 25 feet away from an intersection, he was clearly negligent. Moreover the action of overtaking another vehicle ahead at a speed of 45 miles per hour when visibility, owing to the misty conditions, was limited to only about 35 paces, was held, in *Van Heerden v. S.*, 1968 (2) P.H., O. 58 (O), to constitute reckless driving since, this happened on a highway when there was considerable traffic on the road. Per De Villiers J.:

'Appellant se doelbewuste handelwyse om te poeg om 'n voertuig in mistige weer verby te steek terwyl sy misig alleenlik tot ongeveer 45 mree beperk was, het ongerwyfeld naderende verkeer in gevaar gestel en was, na my mening, 'n opsetlike of moedswillige verontagsaaming van die veiligheid van persone of eiendom.'

See also *Figliione v. S.*, 1964 (2) P.H., O. 21.

With the older type of car and some modern sporting cars it frequently happened that owing to the presence of rain, the driver found it necessary to put up the side-flaps of his car to prevent his passengers and himself from becoming wet. These side-screens, unfortunately, have the effect of limiting his range of vision and also dimming his perception of sounds which he would otherwise hear easily, as would a celluloid windscreen (Cf. *De Vaul v. S.A. R. & H.*, 1965 (1) S.A. 402 (T) at 411). In such cases it behoves the driver to proceed with greater care (*Wright v. Stuttaford*, 1929 E.D.L. 377 at 390). In this case the driver, the servant of defendant, was demonstrating a type of car and had borrowed plaintiff's car for the purpose. Owing to the rain he had put up the side-flaps of the car, and, not seeing that he was about to cross a railway crossing, collided with a train. The Court held that the plaintiff was entitled to damages notwithstanding his servant's negligence. This case is distinguishable from that of *De Beer v. S.A.R. & H.*, 1936 A.D. 262. In this case, owing to the presence of heavy rain and a strong wind, the side-flaps of one side of the car only were put up, and the Court held that neither the visibility nor the hearing of the driver was measurably decreased thereby, but that the accident was due, and solely due, to the fact that the defendants, knowing that trains were obscured at this crossing and that it was extremely difficult to hear or see them, had failed to give adequate warning of the approach of the train (at p. 273). In *Barendse v. Smith*, 1923 E.D.L. 269, the defendant, in moving out from his position at the edge of the roadside, hooted and put his hand through the side-curtain but did not look to see if there was any other traffic approaching from behind. Almost simultaneously he turned at right angles to the street and collided with complainant. On being sued by the latter, he was held liable in damages.

In *Delfport v. Clarence*, 1939 N.P.D. 311, the appellant had driven into an intersection with his windows up and badly frosted, thereby failing to observe respondent's car with which he collided, and the Court ruled that his negligence was the sole and proximate cause of the accident (a) in

failing to see respondent's car, and (b) in turning at too great a speed. See *Heneke v. Royal Insurance Co.*, 1954 (4) S.A. 606 (A.D.).

For the position of a driver running into an unlighted lorry on a dark and misty or foggy night, see *R. v. Beck*, 1937 P.H., O. 25 (C) (*ante*, p. 392), and *Matthews v. Schechter*, 1925 C.P.D. 183, cited with approval in *Pretorius v. South British Insurance Co., Ltd.*, 1963 (3) S.A. 8 (W) at 10. Consequently to enter a robot-controlled intersection at a time when it is raining and visibility is so obscured that the driver is unable to see traffic on his left but only directly in front of him, is an act of negligence (*S. v. Mtshangase*, 1963 (4) S.A. 433 (T)). In this case it is implicit that, if the driver's side window is 'frosted up' (as found by the magistrate) he should open it temporarily in order to obtain a proper view.

In *Thornton v. Fisser*, 1928 A.D. 398, the facts were that the plaintiff and his wife were standing in a safety zone at 11.20 p.m. on the Sea Point-Cape Town road waiting for a tram. It was drizzling slightly and there was no other traffic on the road when they were knocked down by the defendant. On appeal by the plaintiffs, the Appellate Court held that the fact that the defendant had not seen the plaintiffs until he was 3 or 4 yards from them was proof that he either was not keeping a proper look-out or else he was not using his hand- and screen-wiper sufficiently, and that on a wet night such as this, when visibility was bad, he ought so to have regulated his speed that he could have drawn up within the range of his visibility. It was argued that the plaintiffs were guilty of contributory negligence in that they should have realized earlier that they were in danger and should have moved away, and, further, that they should have appreciated that the drizzle might obscure the vision of the driver and that, as they were wearing dark clothes and were standing in a dark road, they might not be visible to the driver until he was close to them, which fact should have been inferred when he did not sound his hooter, but the Court held that whatever they had done in this respect was done in an emergency and that their error of judgment in the circumstances should not form a bar to their recovering damages from the defendant.

3. SMOKE, DUST OR WIND

(a) DUST

The presence of a considerable amount of smoke or dust in the air naturally obscures one's vision, and it may be negligence on the part of the driver who persists in driving when he is, on that account, unable to see where he is going (*Bosch v. Rennie*, 1928 E.D.L. 149; *R. v. Du Plessis*, 1948 (2) S.A. 302 (C); *R. v. Van Rensburg*, 1949 (3) S.A. 207 (T)) at 209. Dust in the atmosphere may be caused by wind, but more often it is due to the presence of another car on the road which is passing one at considerable speed. Thus to endeavour to pass another vehicle, which is setting up considerable dust so that the overtaking driver is unable to see whether the road ahead of him is clear or not, is gross negligence (*Wilson v. Mackay and others*, 1962 (3) S.A. 291 (F.S.C.) at 293. See also *S. v. Mathiba*, 1963 (2) S.A. 121 (T) at 124). In such cases the considerations delineated above, under night-driving and visibility generally, apply with equal force to parties driving when their view is obscured by dust. In *Bosch v. Rennie*

(*supra*) plaintiff's car and that of the defendant collided head-on on a public road. The Court found that the collision took place in the midst of a violent dust-storm and that the plaintiff was on his correct side of the road. The defendant pleaded that he honestly and reasonably believed that he was on his right side of the road and that his mistake was due to the exceptional dust-storm, but the Court found that the defendant, in allowing his car to proceed a considerable distance along the road under conditions in which he was unable to see properly, and without adequate warning to oncoming traffic, had been blameworthy and was therefore liable in damages. See also *R. v. Times*, 1941 E.D.L. at 43, the facts of which were that the appellant was following another car which caused a cloud of dust in the air in its wake. The appellant, instead of slowing down and allowing the dust to clear, followed up to within 30 yards of this cloud and intentionally proceeded on his incorrect side of the road. The cloud was so thick as to obscure whatever objects might be lurking behind it. He collided with an oncoming car on its correct side of the road, killing a passenger therein. Held, that he had been guilty of gross negligence. These cases should be contrasted with the decision in *R. v. Short*, 1927 C.P.D. 146. In that case the facts were that the complainants were standing in the main road, about 4 yards from the kerb, about midnight. They were right in the course of any vehicle travelling in the same direction as that in which the accused was travelling on his motor cycle. This cycle had a bright light which could be seen a long distance off. The complainants stated in evidence that they observed nothing approaching until they were struck and knocked down by the accused's cycle. The accused, in his evidence, which was not disbelieved by the magistrate, said that the complainants were wearing dark clothes and must have been standing in a shadow; that he could not have seen them until he reached a point about 15 yards from them, and that just before he got to the point of visibility he was struck by a whirlwind of dust coming down a side street; that immediately he slowed down to about 10 m.p.h., but that, just as he emerged from the cloud of dust he struck the complainants. On appeal the Court quashed his conviction for injuring complainants by his negligence. This case is easily distinguishable from *Bosch v. Rennie* and *R. v. Times (supra)*, by reason of the fact that here the whirlwind of dust introduced an unanticipated emergency. *Short's* case was, furthermore, distinguished in *Wagenaar v. Thomas*, 1930 W.L.D. 81. (See *ante*, p. 395.)

In *Pitman v. Scrimgeour*, 1947 (2) S.A. 22 (W), the defendant and complainant were approaching each other down opposite inclines. Defendant endeavoured to pass a car in front of him. He could not see through the dust, and without satisfying himself that the road was clear, he accelerated and pulled out on to his wrong side of the road, when he collided head-on with plaintiff. Held, plaintiff was entitled to damages.

The latest decision, in regard to atmospheric dust, is that of *Pienaar v. Commercial Union Assurance Co. of S.A., Ltd.*, 1969 (3) S.A. 61 (T), where a head-on collision took place in a heavy cloud of dust raised by three other vehicles passing plaintiff. Here Coleman J. postulates certain principles to be observed by a motorist in such circumstances namely:

(a) He should enter the dust cloud, if he does so at all at a speed which enables him, within the range of his restricted vision, to avoid a collision

with any person, vehicle or object which he might reasonably expect to encounter in the dust.

(b) He should drive with such skill, care and alertness as will enable him to avoid a collision.

(c) If the visibility in the dust cloud can reasonably be expected to be so bad that, even at a slow speed, there is a danger that he will be unable to avoid a collision, he should not enter the dust cloud at all but should stop and wait for it to subside.

(d) If the dust cloud is not stationary but one which the driver has seen moving towards him and he has, because of that, been able to observe a stretch of the road ahead of him before it becomes obscured by dust and has satisfied that it is clear of impediments, he may drive over that stretch even after it has become obscured provided that he does so at an appropriate speed and with appropriate care. See also *Smit v. Hofmeyer*, 1958 (3) S.A. 828 (T), and *Wilson v. Mackay*, 1962 (3) S.A. 291 (F.S.C.).

(b) SMOKE

Similar precautions should be taken by the driver when his normal visibility is obscured by smoke emanating from some source or another. Thus where the appellant, while driving a vehicle at a time when the road was enveloped in smoke from a veld-fire, had collided with another vehicle proceeding in the opposite direction, it was held that, as he had failed to observe the dense smoke before he had reached it, had failed to slacken his speed, had failed to switch on his headlights, had failed to sound his hooter as a warning to approaching traffic, and had failed to keep his vehicle more to the left side of the road, he had properly been convicted of negligence resulting in the death of the other person (*R. v. Du Plessis*, 1948 (2) S.A. 302 (C)).

Accordingly, anyone driving along a road where the view is obscured by smoke must not drive through it at the highest possible speed, for it is his duty to drive in such a way as to guard against any foreseeable harm and to drive so slowly that he does not collide with anything that might be stationary on the road or moving more slowly than he is (*Fevrier v. Henderson*, 1963 (4) S.A. 491 (N) at 497). This decision is also authority for the proposition that there is no duty on the part of the person causing the smoke (e.g. by veld-fire) to warn motorists about it.

(c) WIND

Apart from the fact that, in having his car completely closed to the influence of climatic conditions, the driver's hearing is appreciably diminished, there is also another factor to be taken into consideration, namely, that in rainy and windy weather the rain is apt to deaden the sounds made by other traffic, and the wind is, as is scientifically known, a force which will carry the sounds away from one in the direction in which the wind is blowing. Where, therefore, the driver depends for his safety on the acuteness and accuracy of his hearing, the fact that a strong wind is blowing is a feature to be borne in mind. For a case where the driver, being oblivious to considerations of this nature, thereby met his death, see *S.A.R. v. Bardeleben*, 1934 A.D. 473. The facts in this case were that the driver of the train concerned, when 150 yards from the crossing,

whistled for about 5 seconds but, owing to the foliage in the vicinity of the crossing, did not see the deceased, who was travelling at a good speed, until the latter was some 20 feet from the rails. On appeal to the Appellate Division the Court held that the deceased, in giving the engine-driver a bare $1\frac{1}{2}$ seconds in which to act, placed the latter in an emergency, and that the Administration could not be held to be guilty of contributory negligence but that, on the contrary, the deceased motorist's death was due solely to his own negligence in failing to keep a proper look-out. (See *post*, p. 467.) See also *Union Govt. v. Buur*, 1914 A.D. 273, where De Villiers C.J. said:

'In my opinion the plaintiff was to blame for the accident which overtook him. He was well acquainted with the road along which he was travelling; he saw the up train passing before he reached the line; he had not the patience after he had reached the line to wait a few seconds until the up train ceased to mask the down line, he knew that a strong wind was blowing which might prevent him from hearing the bell, but he took the dangerous risk of crossing the line with the unfortunate result which followed.'

A curious case, where the Court held that the motorist was guilty of negligence in failing to anticipate the action of the wind, is that of *Crook v. Erasmus*, 1927 E.D.L. 142. The facts of this trial were that plaintiff's car having broken down at the bottom of a steep gradient, plaintiff signalled defendant to stop his car, which he did on a platform in the road above the steep grade, applied his brake, and placed his car with the front wheel against the low wall of a drain at an angle to the road and proceeded to the plaintiff's assistance. It was a windy day, and 25 minutes later a gust of wind started defendant's car, which ran down the gradient, striking the bank in three places, skidding in places, and collided with plaintiff's car, which struck plaintiff and broke his leg. The Court found that the gusts of wind were such that, in the circumstances of the weather on the day in question, defendant might have been expected to have foreseen, and provided against, by applying his brake properly, and further, that though the defendant had left his car at the invitation of the plaintiff and for the latter's benefit, and was away longer than he anticipated, he was nevertheless guilty of negligence in failing efficiently to apply his brake and was therefore liable in damages to the plaintiff.

CHAPTER XIX

DUTIES TO PERSONS AND ANIMALS

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The scope of this chapter is to examine the respective duties and reciprocal obligations of the driver relative to (a) pedestrians, (b) children, (c) animals, (d) passengers, and (e) trespassers generally.

1. PEDESTRIANS

(a) RIGHTS OF PEDESTRIAN

Under the common law the pedestrian has the **same right** to use the street as a vehicle (*Baratz v. Johannesburg Municipality*, 1913 T.P.D. 732). Per Wessels J.:

'The right to use the highway or street is, therefore, common to foot-passengers and vehicles. Their rights are equal, the one has no superior right to the other. Even if the foot passenger is infirm from disease he has a right to walk in the carriage-way and is entitled to require from the drivers of vehicles the exercise of reasonable care (*Boss v. Litton*, 5 C. & P. 407).'

It might be thought that with the vast increase in volume of motor traffic on our streets in the last fifty years some modification of this dictum would have been forthcoming, but Rumpff J.A. in *South British Insurance Co., Ltd. v. Smit*, 1962 (3) S.A. 826 (A.D.) at 840, after citing the aforementioned dictum, said:

'Dit is waar dat die volume en tempo van die verkeer sedert 1913 aansienlik verhoog is, met 'n dienoorkomstige verswaring van pligte, van sowel voetgangers as bestuurders van motorvoertuie, maar die basiese regte van beide klasse mense het onveranderd gebly.'

The further rights of the pedestrian will be considered and propounded when the respective obligations of the driver towards him come to be considered later in this chapter.

(b) DUTIES OF PEDESTRIAN

Under the **common law** a pedestrian, like every other person, is under a positive duty to refrain from causing injury to others and if he, by his negligent act is the cause of harm resulting to another person using the road, he would himself be liable to suffer an apportionment of his damages since he must exercise his rights with due regard to the rights of such other road users (cf. *R. v. Freeman*, 1931 N.P.D. 460 at 463). Per Lansdown J.

'A pedestrian must use the right reasonably and must allow for the reasonable passage of vehicular traffic. He may cross the road from one side to the other, but in doing so he must exercise his senses of perception and must not cross without looking for oncoming traffic so that he may cross with safety to himself and with due regard to the rights of those driving vehicles, who indeed are entitled to assume that the pedestrian will act reasonably.'

Accordingly, a pedestrian, wishing to cross a road, has a primary duty to make sure that he has chosen an opportune moment to do so (*Swanepoel v. Parity Insurance Co., Ltd.*, 1963 (3) S.A. 819 (W)), and it would be some fault on his part to cross a busy thoroughfare where the road is not completely clear and where there is no centre island, with the result that he may have to wait in the middle or to take a step backwards in order to avoid the traffic (*Sonday v. Norwich Union Fire Insurance Society, Ltd.*, 1966 (3) S.A. 231 (C) at 234). This dictum of Watermeyer J. in *Sonday's* case cannot be regarded as an absolute one in all cases, but only applicable to the circumstances of that case, i.e. at night-time and when the pedestrian could easily have crossed at a robot-controlled crossing some 10 yards away. It is therefore submitted that it in no way overrules the general rule set out in *Campbell v. Axelson*, 1938 (1) P.H., O. 20 (N), and in *Fallon's Estate v. Claret*, 1932 A.D. 117 (which were not referred to in *Sonday's* case) to the effect that, in commencing to cross, the pedestrian must pay attention to the traffic on his **right-hand** side and, upon reaching the centre line of the street his duty then is to pay attention to the traffic approaching on his **left-hand** side and, furthermore, at the latter stage of his progression,

he would not be guilty of negligence if he then failed to have regard to traffic approaching on his right, for he would **not** be **obliged** to look out for and expect traffic approaching him on the **incorrect side** of the road (*Fulton v. Minister of Posts and Telegraphs*, 1916 T.P.D. 677). See also *post*, p. 413 and *R. v. Marais*, 1932 (2) P.H., O. 42 (C); *Beech and another v. Setzkorn and another*, 1928 C.P.D. 500 at 504; *Singh v. New Zealand Assurance Co., Ltd.*, 1966 (4) S.A. 154 (D) at 157; and *Union & National Assurance Co., Ltd. v. Mate*, 1952 (2) S.A. 109 (N) at 112.

While, therefore there is a duty upon the vehicle driver to look out for a pedestrian who may be caught in the centre of the road (*R. v. Sullivan*, 1942 C.P.D. 123 and, while such duty is not lessened by reason of the fact that there are footpaths on the sides thereof available to pedestrians (*R. v. Hope*, 1945 N.P.D. (J/C 63/45), it is nevertheless submitted that a pedestrian who chooses to perambulate down a **busy** street instead of using the pavement available to him would be courting trouble and, in appropriate circumstances, would have to suffer apportionment for his own negligence in so doing. See *R. v. Pace*, 1930 C.P.D. 116 at 118 where Van Zyl J. is reported to have said:

'It is true that the rules of the road are for regulating traffic as between vehicles and do not strictly apply to pedestrians, yet a pedestrian, wishing to cross a road or street, cannot ignore these rules and still less act in defiance of them. The least that can be expected of him is that he will not unreasonably **hold up traffic**, and that he will take all reasonable precautions for his **own safety**. That he should do this has become all the more necessary because of the large increase within recent years of the number of fast-moving vehicles on our roads and streets.'

See also *Bezuidenhout v. Berman*, 1929 O.P.D. 148 at 153-4, and *Conradie v. General Accident Fire and Life Assurance Co., Ltd.*, 1951 (1) P.H., J. 4 (A.D.). It would, therefore, be negligence on the part of a group of pedestrians to **stand** in the middle of the road and in the way of oncoming traffic at night-time when they happen to be wearing dark clothes (*R. v. Short*, 1927 C.P.D. 146).

Sunday's case (*supra*) clearly cautions the pedestrian to cross only at **pedestrian crossings**, where there is one in the proximate vicinity but, even here (unless the traffic lights are such as to bar all vehicular traffic from entering the square of the intersection while only pedestrians are permitted to cross), the pedestrian's safety is not absolute, since the green light in his favour also concedes permission to vehicles proceeding in the same direction to enter the intersection. The result is that the pedestrian is exposed to the danger of being run over by vehicles from his right rear which are turning to their left (see *ante*, pp. 376-7). In this regard the decision in *Frodsham v. Aetna Insurance Co.*, 1959 (2) S.A. 271 (A.D.), is authority for the proposition that, if a pedestrian knows that traffic might be coming from behind him, he should keep a look-out, or at least listen for its approach.

Statutory Duties of Pedestrian

While section 127(2) of the Ordinances, on the one hand, stipulates that the driver of a vehicle must, at pedestrian crossings, yield the right of way to pedestrians, section 127(3) provides that a pedestrian shall not walk, or run, into the path of a vehicle which is so close to the crossing that it is impossible for the driver to give him the right of way. The purpose and

object of subsection (2) are set out in *Passmore v. Kock*, 1946 A.D. 922 at 929, citing *Sparks v. Edward Ash, Ltd.* [1943] 1 K.B. 223 at 231.

The further duties of the pedestrian are to be found in section 128 of the Ordinances which, in effect, stipulate that:

- (a) if there is a sidewalk or footpath a pedestrian may not walk on the roadway except for the purpose of crossing it;
- (b) if there is no sidewalk, he must walk as near as possible on his right-hand side of the roadway;
- (c) when crossing a public road he must not loiter thereon; and
- (d) he must not so conduct himself as to be a source of danger to other traffic on the road.

These provisions may, it is submitted, be taken into consideration in coming to a decision as to whether the pedestrian had contributed to his damage by his own negligence (cf. *McLauchlan v. Barnes*, 1954 (4) S.A. 503 (S.R.)).

A pedestrian who wishes to cross a street which is being used by motor-cars must use his senses to ascertain whether a motor-car is approaching. If he **steps straight into the street without looking he is negligent**, because it is as much his duty to take care to avoid being injured as it is that of the driver of a motor-car to avoid running over him (*Calder v. Simon*, 1942 A.D. 337; see also *African Guarantee & Indemnity Co. v. Evans*, 1950 (3) S.A. 497 (A.D.)). The duty of looking to see whether a vehicle is approaching is greater when a pedestrian steps on to the street next to some object like a bus or tram which **obscures his view** (*Beech v. Setzkorn*, 1928 C.P.D. 500).

While there is an obligation on the pedestrian to be on the look-out he is not obliged to **turn his head continually** (*Pierce v. Taylor*, 1934 E.D.L. 193). Per Pittman J. (at 199), in quoting *Estate Fallon v. Claret*, 1932 A.D. at 182:

'As was pointed out in *Clark v. Petrie*, 16 Sc. L.R. at 626-7, there is no obligation on foot-passengers in a street to be constantly looking in all directions. It may be a wise precaution, but to omit it is not always negligence. A foot-passenger must take reasonable precautions to see that, at the moment of crossing, he is not in immediate danger of being run over, but he need not be constantly looking back to see if he is being pursued by a tram. If he did, he would probably be knocked down by some other vehicle or foot-passenger.'

This decision was followed in *Rawles v. Barnard*, 1936 C.P.D. 74, where Davis J. said:

'The rule of looking only one way referred to is one of necessity: in a busy street it is impossible to look both ways at once and the pedestrian is consequently absolved from negligence if he looks only in the direction from which he can normally expect traffic to come';

but he decided that it did not absolve a pedestrian who must have known that a car was approaching from taking due steps to avoid it. On the other hand, a **single glance** round in a **busy thoroughfare** is not enough (*Trevor-Smith v. Walters*, 1928 N.L.R. 351). In this case it was ruled that the pedestrian was guilty of contributory negligence in not keeping a good look-out in that direction from which traffic might reasonably be expected to come.

Proceeding diagonally across road: The danger of proceeding diagonally across a road is to be found in the fact that the pedestrian, having looked to his right before crossing, takes considerably more time in making his journey across the street than he would if he had proceeded straight across it; consequently, in the meantime, circumstances may have altered appreciably and vehicles not observed by him are coming up upon his rear without his being aware of their approach. Accidents have happened frequently because of such conduct, *vide Sutherland v. Banwell*, 1938 A.D. 476; *Pierce v. Taylor*, 1934 E.D.L. 193; *R. v. Freeman*, 1931 N.P.D. 460; *Thompson v. Kershaw*, 1926 E.D.L. 55; *R. v. Tickton*, 1936 (1) P.H., O. 34 (T). It is submitted that the courts should, in future, introduce some modification to the aforementioned decisions in *Pierce v. Taylor*; *Estate Fallon v. Claret*; *Rawles v. Barnard* and, having regard to the decision in *Trevor-Smith v. Walters*, 1928 N.P.D. 351, rule that a pedestrian, acting in such a manner, would be guilty of such fault as would induce an apportionment of his damages.

In *Langenveld v. Parsons*, 1924 T.P.D. 414, it was decided that where there are **shadows** on the road then there is an increased obligation on him to keep a keen look-out, for, as indicated in *Rawles v. Barnard*, 1936 C.P.D. 74, while 'it is incumbent on a motorist to pay some heed to pedestrians for possible foolishness on their part . . . it is equally incumbent on pedestrians to **anticipate possible recklessness by the drivers** of cars'. See also *Robinson v. Henderson*, 1928 A.D. 138; *Thornton v. Fismer*, 1928 A.D. at 410, and *Moore v. Minister of Posts & Telegraphs*, 1949 (1) S.A. 815 (A.D.).

Unexpected actions: The pedestrian, in making use of his right to be on public highways, must not lose his head or act unreasonably. Should he do so he must take his share of blameworthiness for stupidly making an unexpected manoeuvre, such as stepping backwards into the way of an approaching motor cycle (*S. v. Theron*, 1962 (2) S.A. 253 (C)). If he exposes himself foolishly or unnecessarily to obvious dangers he will only have himself to blame for his injuries (*Shand v. Weyhausen*, 1911 W.L.D. 169), and today will have his damages apportioned according to the degree of fault on his part (*Sonday v. Norwich Union Fire Insurance Society*, 1966 (3) S.A. 231 (C)). Thus, after hearing and seeing the approach of a vehicle his action in suddenly lurching forward into its way would be castigated as *culpa* on his part (*African Guarantee & Indemnity Co. v. Evans*, 1950 (3) S.A. 497 (A.D.)) for, although the motorist is under an obligation to give him due warning and a reasonably wide berth (*R. v. Bakker*, 1949 (2) S.A. 113 (N)) and see *post*, p. 417), when passing him, he should also have regard to the possibility of some degree of unreasonable conduct on the part of the motorist. Certainly he should not put the motorist in a dilemma by his own erratic behaviour (*Fulton v. Minister of Posts and Telegraphs*, 1916 T.P.D. 677). Nor should he suddenly emerge from behind a parked car unexpectedly into the way of a passing motor-car (*New Zealand Insurance Co. v. Karim*, 1963 (4) S.A. 872 (A.D.)), nor run heedlessly across a street into the way of oncoming traffic (*Selikman v. London Assurance*, 1959 (1) S.A. 523 (W)). For the stupid action on his part in kicking at a passing car he would only have himself to blame for his own injuries (*R. v. Nichol*, 1949 (2) S.A. 875 (N); *R. v. Grunes*, 1950 (4) S.A. 279 (N)). For

the negligence of a child over 7 years of age see *post*, p. 421. See also *Van Rooyen v. Rondalia Versekeringskorporasie van S.A.*, Bpk., 1968 (2) P.H., O. 55 (W), and *post*, p. 417.

The pedestrian's further duties will be found below when considering the obligations of the driver to him.

2. DUTY OF DRIVER TO PEDESTRIAN

The reciprocal duty of the driver of a vehicle is set out by Lansdown J. in *R. v. Freeman*, 1931 N.P.D. 460, where he said:

'On the other hand, a man driving a motor-car must have regard to the rights of pedestrians, and a pedestrian is entitled to assume that the motorist will act reasonably. The motorist must further remember that he is driving a fast-moving vehicle of dangerous potentialities. I shall not endeavour to enumerate all his duties; it is sufficient for the purposes of this case to say that his speed must be reasonable in the circumstances, that, where reasonably necessary, he must give due warning of his approach to persons who are on the roadway; that when passing other vehicles going in the same direction he should sound his hooter so that the driver thereof and pedestrians and the drivers of vehicles who may, by the car proposed to be passed, be shut out from his vision, be warned of his approach; and that upon the occurrence of an obstruction of his view from any cause he should slow down or stop according as the circumstances might dictate, as a reasonable measure for the safety of himself and other persons who might be on the roadway.'

In order more fully to analyse and appreciate the respective reciprocal duties existing between a driver and a pedestrian it is convenient to examine the various situations when the pedestrian is (a) stepping off the sidewalk; (b) crossing a street; (c) walking in the street; (d) standing in the street; (e) alighting from an omnibus; (f) a member of a group and (g) the overall general duty to give a pedestrian a wide berth between the latter and his vehicle.

(a) STEPPING OFF SIDEWALK

Though it is the driver's duty to anticipate foolishness on the part of pedestrians, he cannot reasonably be expected to anticipate that a person will stupidly step off a pavement into the way of oncoming traffic without looking (*Calder v. Simon*, 1942 A.D. 337, and *Sutherland v. Banwell*, 1938 A.D. 476 at 480-1; *Delvin v. Licht*, 1930 (2) P.H., J. 17 (E)). See, also, Watermeyer J. (as he then was) in *Beech and another v. Setzkorn and another*, 1928 C.P.D. 500 at 504, cited with approval in *Singh v. New India Assurance Co., Ltd.*, 1966 (4) S.A. 154 (N) at 157:

'A pedestrian who wishes to cross a street which is being used by motor-cars must, in my opinion, use his senses to ascertain whether a motor-car is approaching. If he steps into a street without looking, he is, in my opinion, negligent, because it is as much his duty to take care to avoid being injured as it is that of the driver of a motor-car to avoid running over him. If he steps straight into the path of an oncoming car which he would have seen if he had kept a proper look-out, then he has himself to blame if he is run over. The duty of looking to see whether a vehicle is approaching is greater when the pedestrian steps on to the street next to some object like a bus or a tram which obstructs that view, because he must know that there is a part of the road upon which vehicles may be travelling which he cannot see and his act in stepping on to the street is invisible to the driver of the oncoming vehicle because of that obstruction.'

In *R. v. Tickton*, 1936 (2) P.H., O. 34 (T). In this case while the driver was suddenly and momentarily blinded by approaching headlights, the

pedestrian stepped off the pavement into his way and was struck in the back immediately he did so.

On the other hand, if the driver perceives, or ought to have seen that a pedestrian is about to leave the pavement, he should take reasonable steps to avoid him. Thus, where the defendant, seeing the plaintiff about to cross the street in a slant-wise direction, decided to go behind him, there being just enough space to do so, but plaintiff, on suddenly seeing defendant's car bearing down upon him, jumped back and was knocked down, the Court found that the defendant had been guilty of negligence (*Thompson v. Kershaw*, 1926 E.D.L. 55). In *Howitt v. Bell*, 1930 E.D.L. 76, the plaintiff, on a rainy night, after a single glance to the left (the direction from which traffic might reasonably be expected to come) started to cross the street, a distance of 32 feet. At a distance of a pace or two from the kerb he collided with a motor cycle coming from that direction at a speed of 10 m.p.h. The cyclist, owing to the very heavy rain, could only see about 6 yards ahead. Held, that both parties had been negligent. The same result was arrived at in *Trevor-Smith v. Walters*, 1928 N.L.R. 351. Per Dove-Wilson C.J.:

'And even if, when he stepped off the pavement, the street appeared to be empty, he had no reason to assume that it would remain so while he pursued the dangerous course which he chose to take, to cross it with his back toward oncoming traffic.'

Again in *London Passenger Transport Board v. Upson* [1949] 1 All E.R. 60 (H.L.) at 66, Lord Wright held that a pedestrian who stepped into a street from behind a parked taxi-cab without looking was guilty of contributory negligence. Today he would have to suffer an apportionment of his damages.

In *R. v. Du Plessis*, 1936 A.D. 124, the Court of Appeal came to the conclusion that, on the facts, the probabilities were that the deceased lurched off the pavement into the way of the oncoming bus of the accused in a sudden manner (i.e. at a distance of 9 feet from the pavement) and that the accused had been wrongly convicted of negligently causing his death; while in *De Wet v. Odendaal*, 1936 C.P.D. 103, it was found that the deceased negligently ran past a stationary car into defendant's car.

Pedestrian walking into stationary car: A curious situation arose in *S. v. Shimbarta*, 1966 (1) S.A. 771 (N), where a driver, upon seeing a pedestrian step off a pavement into a street without looking, when the latter was 10 to 15 paces away, immediately stopped his car, but the pedestrian, who was looking only straight ahead walked into the car and was injured. Here it was held (following *New Zealand Insurance Co. v. Karim*, 1963 (4) S.A. 872 (A.D.)), that, since he saw that she was not looking, he should have hooted to warn her of his presence and have swerved out of her way, he had been guilty of negligence.

(b) CROSSING A STREET

The duty of a driver, once he sees that a pedestrian is in the street, and actively engaged in the process of crossing it, is to adjust his speed and direction to make certain of avoiding a collision (*R. v. Grobler*, 1932 O.P.D. (J/C 57/32)). Per Krause C.J.:

'It seems to me that a motor-cyclist must expect pedestrians to cross over the road. There is nothing against it; pedestrians are entitled to cross the road at any point. Any person therefore in charge of a fast-moving vehicle must expect that at

any moment some pedestrian may take it into his head, as he is entitled to do, to cross the road; and it is the duty of the person who is in charge of such fast-moving vehicle to exercise the utmost caution and certainly to keep a proper look-out. It is also necessary to keep his vehicle under proper control so as to stop in case of emergency.'

This dictum would appropriately apply particularly in places where there is no pedestrian crossing. (See *Nance's case* [1951] 2 All E.R. 448 (P.C.) at 450.

Where, therefore, a motorist collides with a pedestrian who is crossing a street at a slow pace, there being no other vehicles or pedestrians in the vicinity and nothing to obstruct the driver's view, there will be an onus on him to show that the accident happened without fault on his part (*Fulton v. Minister of Posts & Telegraphs*, 1916 T.P.D. 677. There is no actual presumption in law of negligence on the driver's part, but merely an inference of fact which may be drawn in the absence of other facts (*Norwich Union Fire Assurance Society, Ltd. v. Tutt*, 1962 (3) S.A. 993 (A.D.)).

In *Katzenstein v. Duvenhage*, 1929 N.P.D. 294, the defendant was about 40 yards away when he saw the plaintiff, an elderly man, who was then about a quarter of the way across the street. He sounded his hooter but the plaintiff **gave no indication** of having heard it and did not, in fact, hear it. Without altering his speed, the defendant then inclined his car to the right so as to pass behind the plaintiff, but when about six paces off, the plaintiff jumped in an instinctive effort to avoid an apparent danger and was injured. Held, he was entitled to damages. See also *R. v. Nichol*, 1949 (2) S.A. 875 (N). In *Fulton's case* (*supra*), the pedestrian did not look, went forward and then went back, and by so doing put the motorist in a dilemma. See also *Dunmeyer v. Priestly*, 15 S.C. 393; *Clark v. Petrie*, 16 Sc. L.R. 626, and *Davies v. Crossling*, 1935 W.L.D. 107. See also *post*, p. 417, and *S. v. Theron*, 1962 (2) S.A. 253 (C). Here the pedestrian in crossing over a street in front of a bus which was moving off made an unexpected movement by stepping backwards into the way of a motor cyclist and the Court held that the latter's conviction for negligent driving should be set aside, Compare *Van Rooyen v. Rondalia Versekeringskorporasie* (cited *post*. p. 417).

Although (as indicated above at p. 406) a pedestrian, on reaching the centre line of a main thoroughfare which he is crossing, should pause and **look to his left** before proceeding further, his failure to take this precaution will not excuse the defendant driver from liability for damages if the latter was continuously negligent up to the moment of impact and if the latter should have seen the pedestrian crossing the street at a distance of 150 yards away (*Sutherland v. Banwell*, 1938 A.D. 476). In this case the plaintiff pedestrian was, at night-time, crossing a road some 20 yards wide at an angle with her back half-turned towards following traffic. She had looked both ways before stepping off the pavement and, when about two-thirds of the way across, she suddenly saw defendant's car approaching her rear 17 yards away. She **stood still** and was struck by the car. Held, that defendant could, at the final stage, have avoided the accident. In this case the deceased was not seen by the driver until he was 40 feet away. Held, he should have seen her sooner. (See also *R. v. Ungerer*, 1940 P.H., O. 36 (C), and *Sonday v. Norwich Union Fire Insurance Society*, 1966 (3) S.A. 231

(C.) It is submitted that the position in *Union & National Assurance Co. of S.A. v. Mate*, 1952 (2) S.A. 109 (N), where the pedestrian crossed without looking properly and where the driver failed to hoot and apply his brakes, would now be met by an apportionment of damages. But a motorist cannot be held blameworthy where a pedestrian, after hearing the driver's hoot, stops and looks towards him and then, at the last moment lurches into the way of his car (*African Guarantee & Indemnity Co., Ltd. v. Evans*, 1950 (3) S.A. 496 (A.D.) at 501-2).

On the other hand where a pedestrian's manner has clearly indicated his intention of crossing a road and where he has not yet entered the portion of the road in which the motor vehicle coming from behind him should have travelled, his failure to look may not be the cause of the collision and there may be no contributory negligence on his part (*Kruger v. Ludick*, 1947 (3) S.A. 23 (A.D.)). Here the pedestrian had reached a point two feet from the centre of a very wide road and was hit by a car travelling at 15 m.p.h. on its incorrect side of the road. There was room on each side of the pedestrian to pass him by safely. He never saw the car because he did not look. The motorist did not see him because he was blinded by the glare of the sun. Held, the pedestrian was entitled to damages.

There is a considerable difference between the case of a pedestrian suddenly and unexpectedly stepping off the pavement and into the way of an oncoming vehicle and the case where the driver, having seen the first pedestrian crossing in front of him, failing to anticipate that his companion would also follow him (*Mbanjwa v. Marine & Trade Insurance Co., Ltd.*, 1968 (2) P.H., O. 39 (D)). In this case the motorist was held to be 30 per cent to blame for the accident.

In this regard it should be noted, however, that while a driver must be expected to see pedestrians crossing the street ahead of him, he cannot be expected to provide for the contingency of a **child** suddenly **running** across the road, giving him a view of her for only 15 feet or one second in which to appreciate the situation and avoid a collision (*R. v. Cymma*, 1938 P.H., O. 53 (T)). Much, of course, would depend on whether the driver could reasonably anticipate such foolish action or not and, today, the fault of the child, if he is of an age and understanding to be capable of *culpa*, would be taken into consideration in apportioning damages (*Neuhaus N.O. v. Bastion Insurance Co., Ltd.*, 1968 (1) S.A. 398 (A.D.)). (See, *post*, p. 424.) Accordingly a driver of a car, while passing double-parked vehicles, cannot be expected reasonably to have foreseen the recklessness of a child who runs across a street after emerging unexpectedly from behind the said parked vehicles (*New Zealand Insurance Co. v. Karim*, 1963 (4) S.A. 872 (A.D.)).

A driver approaching a **pedestrian crossing**, indicated by a sign, must, unless he can see that there are no pedestrians near by, approach at such a speed as to be able, if necessary, to stop before reaching the crossing in order to allow for the free and unobstructed passage of any foot passenger upon the carriage way on the crossing. (*Selikman v. London Assurance*, 1959 (1) S.A. 523 (W) at 525; *London Passenger Transport Board v. Upson and another* [1949] 1 All E.R. 60 (H.L) at, 65 and section 127(2) of the Ordinances.) In the latter case the pedestrian crossing was obscured by a taxi-cab parked close to the crossing and it was held that, since the driver

was unable to see whether or not a pedestrian was about to cross, he had been negligent in not travelling slow enough to stop when he did see her. At such places pedestrians have precedence over all vehicles on the crossing way, and it follows that a pedestrian who is knocked down whilst reasonably making use of such crossing cannot be met with the defence of contributory negligence (fault) (*Bailey v. Geddes* [1938] 1 K.B. 156; *Chisholm v. London Passenger Transport Board* [1938] 4 All E.R. 850). A pedestrian must, however, exercise at least a modicum of care, for he is not entitled to proceed as he likes or with his eyes shut (*Pincus v. Solomon*, 1942 W.L.D. 243). *Norwich Union Fire Insurance Soc., Ltd. v. Tutt*, 1960 (4) S.A. 851 (A.D.) at 854; *Passmore v. Koch*, 1946 A.D. 922 at 929).

At the time *Bailey v. Geddes* was decided, it was thought that that decision placed severe limitations on, if it did not actually exclude, the defence of contributory negligence where a pedestrian was injured on a pedestrian crossing. The decision in *Pincus v. Solomon* however, is consistent with the decision in *Sparks v. Ash, Ltd.* [1943] 1 All E.R. 1, wherein it was held that as the action is based on a breach of a statutory duty, the defence of contributory negligence (fault) may competently be raised. There can be no doubt, therefore, that this truly expresses the correct legal position in cases now where apportionment of damages is sought. (See *ante*, p. 380.) In *Selikman v. London Assurance*, 1959 (1) S.A. 523 (W), the plaintiff had run across the portion of the street demarcated as a pedestrian crossing without looking and in the face of oncoming traffic, and it was held that his negligence in so doing entitled him to only one-third of his damages.

Cases

In *Pierce v. Taylor*, 1934 E.D.L. 193, the facts were that the plaintiff at night crossed a road diagonally in a north-easterly direction. On embarking on the tarmac which was 25 feet wide, he first glanced to his right and then to his left, in which direction he could see for 200 yards, and, seeing no vehicle coming on either side, he proceeded to the spot where the collision took place. After the initial glance he gave no further glance to his left. Plaintiff was struck by the car of the defendant, who approached him from plaintiff's left rear at a point 3 feet south of the north edge of the tarmac. Defendant was admittedly negligent in failing to keep a proper look-out, but it was contended that the plaintiff was also negligent. The Court, however, discarded this contention and awarded damages.

Plaintiff, in crossing a street, saw a big black car approaching him, but no other vehicle. As he crossed in front of it he was knocked down by the defendant's car which was overtaking this black car. The approach of the defendant's car was apparently masked by the larger car and the plaintiff was unaware of the former car until he was knocked down. Held, he was entitled to damages (*Fallon's Estate v. Claret*, 1932 A.D. 177).

Two pedestrians were crossing a road diagonally at night and walked with their backs towards oncoming traffic. They saw accused approaching some 300 feet away and considered they had enough time to cross. Accused was travelling over the speed limit of 20 m.p.h., and just as he passed another car the lights of the latter obscured his visibility, owing to their reflection in the windscreen, with the result that he did not see one of the pedestrians whom he ran over and killed. The pedestrians were, at the time, under a street-lamp, and were seen by other people in the vicinity some 70 to 100 feet away. Held, that the accused was guilty of culpable homicide (*R. v. Freeman*, 1931 N.P.D. 460).

Where the deceased, without looking for oncoming traffic, ran diagonally across the street and appeared not to see the accused's car, with which she collided, the Court

came to the conclusion that, as the accused had only a fraction of a second in which to avoid her, and had in fact swerved to avoid her, his conviction for culpable homicide should be quashed (*R. v. Higgs*, 1930 E.D.L. 239). See, also, *Shand v. Weyhausen*, 1911 W.L.D. 169.

The defendant had stopped his car at an intersection where the robot lights were against him, but, thinking that he was too near the centre of the road and too near the intersection, he, after a brief glance in his rear mirror, reversed briskly and collided with a pedestrian who had got out of another car and was walking behind his car. Held, he was guilty of negligence, nor was the pedestrian (plaintiff) negligent in crossing the intersection in contravention of a by-law which prohibits pedestrians to cross against the red light (*Watt v. Western Assurance Co.*, 1952 (3) S.A. 778 (W)).

Joint negligence

Notwithstanding the fact that the pedestrian has failed to look in the direction in which traffic may be expected, he will recover a portion of his damages if he can show that the defendant had an adequate opportunity of avoiding his, the plaintiff's negligence (*Baratz v. Johannesburg Municipality*, 1913 T.P.D. 739; *McLean v. Bell*, 147 L.T.R. 262 (H.L.); *Sutherland v. Banwell*, 1938 A.D. 476). In the cases before 1957, if it was found that the accident was the result of the joint negligence of the pedestrian and the motorist, neither could recover damages (*Ford v. Town Hall Bottle Store*, 1926 W.L.D. 214; *Sparks v. Benson*, 1928 T.P.D. 38; *Shand v. Weyhausen*, 1911 W.L.D. 169; *Pincus v. Solomon*, 1942 W.L.D. 243; *Taylor v. S.A.R. & H.*, 1957 (2) P.H., J. 20 (N)).

(c) OVERTAKING PEDESTRIANS WALKING IN STREET

The statutory duty of the pedestrian where there is no side-walk, to walk on his right-hand side of the highway and as near as possible to the kerb thereof, has been noted (*ante*, p. 408) and, in this regard it has been decided that to walk on the wrong side of the road namely with his back to oncoming traffic and when he is wearing **dark clothing** is such an act of negligence as will result in a reduction of his damages (*Vermaak v. Parity Insurance Co., Ltd.*, 1966 (2) S.A. 312 (W) at 314). Nevertheless the driver who does see him should also overtake him with due caution and care (*Bezuidenhout v. Berman*, 1929 O.P.D. 148; *R. v. Wells*, 1949 (3) S.A. 83 (A.D.) at 88). His duty is to **hoot, brake his car**, and **swerve** if necessary (*Sutherland v. Banwell* (*supra*) at 484). If, therefore, a driver, in broad daylight, overtakes and collides with a pedestrian walking in the same direction as the driver in a public street, devoid of all traffic, there is a presumption, not in law, but of fact, of negligence if the driver gives (a) no explanation, or (b) an explanation not accepted by the court (*Davies v. Union Govt.*, 1936 T.P.D. 197; *R. v. Sandos*, 1932 A.D. at 317; *R. v. Koen*, 1937 A.D. 211; *R. v. Jonas*, 1949 (2) S.A. 801 (N); *R. v. Nichol*, 1949 (2) S.A. 875 (N); *Kruger v. Ludick*, 1947 (3) S.A. 23 (A.D.) and *R. v. Sacco*, 1958 (2) S.A. 349 (N) at 351; *Norwich Union Fire Insurance Society, Ltd. v. Tutt*, 1962 (3) S.A. 993 (A.D.); *Frodsham v. Aetna Insurance Co.*, 1952 (2) S.A. 271 (A.D.)). See, also, *R. v. Ekermans*, 1942 C.P.D. 169, where the accused was convicted of culpable homicide for running into some soldiers while they were marching along a street in the same direction as the accused was driving at night-time. Accordingly if the driver fails so to regulate his speed under the conditions of visibility that he is unable to avoid colliding

with a pedestrian walking in the road ahead of him will be guilty of *culpa* (*Well's case (supra)* at 88).

From the pedestrian's point of view there appears to be some distinction between walking along a **busy street** and one which is **empty** of traffic (*Hulley v. Cox*, 1923 A.D. 234). Per Innes C.J.:

'Now a due degree of care is undoubtedly required of a pedestrian who leaves the pavement and exercises his right to use the road. It is unnecessary for the present purposes to investigate the degree of care which, under the circumstances, is reasonable, nor to compare it with the standard of care expected of the driver of a vehicle. Because this is not the case of a foot passenger venturing on a road crowded with traffic. The street was empty and there was ample room for the passage of any vehicles which might happen to pass. The cross-streets in the vicinity interfered with the continuity of the side-walk, and it is a natural and a legitimate thing under the circumstances to walk along the edge of the roadway. At the spot the street was 59 feet wide, so there was a free space of 50 feet or thereabouts to the right, surely ample for the due passage of the approaching car. Under these circumstances, assuming the deceased pedestrian heard the noise and saw the reflection of the light, it cannot be said that it was his duty to step on to the pavement. He was entitled to think that the driver would exercise due care and in so doing would see him and make use of the open road on the right to avoid him.'

The logical reason why a pedestrian should keep to his right-hand side of the road is that traffic overtaking him from behind can safely pass him on his left while he will have a good view of traffic approaching him from the front and thereby have ample opportunity of avoiding a collision by stepping to his right out of the way of oncoming traffic. In this regard it has been ruled that it is not unreasonable behaviour on the part of a pedestrian to walk in a broad street (free of traffic other than defendant's car) without looking behind him if he leaves the whole of the left-hand side of the road available for traffic overtaking him on its correct side of the road (*Kruger v. Ludick*, 1947 (3) S.A. 23 (A.D.)).

Where therefore a road in a residential area is tarred and the verge is rough with loose stones, and the traffic is not very dense, it does not constitute negligence—particularly for a woman—to walk at night on the edge of the tarmac (*McLauchlan v. Barnes*, 1954 (4) S.A. 503 (S.R.)).

Once, however, the driver sees that the pedestrian has **looked** in his direction and stopped, he may usually assume that the latter is aware of his approach (*Van Vuuren v. Port Elizabeth D.C.*, 1932 E.D.L. 98). Per Graham J.P., quoting *Gibb on Motor Accidents*, section 182(1):

'Even if a pedestrian, walking away from or across the path of a motor vehicle, is observed to look round and look towards an approaching vehicle, this does not absolve the driver of the approaching vehicle from taking reasonable precautions to avoid a collision, for the driver should not assume that the pedestrian intends to stop and permit the vehicle to continue on the path he is pursuing. But when the driver of a motor vehicle observes a pedestrian standing alongside the road and the pedestrian looks towards him and **continues standing and looking**, in my opinion the driver is justified, in the absence of any signal to the contrary, to assume that the pedestrian intends to remain where he is and the driver of the vehicle, travelling at a reasonable speed and on his proper side, is not guilty of negligence in keeping on a path which will enable him to pass the pedestrian at a distance of four or five feet.'

See, also, *R. v. Jacobs*, 1947 (3) S.A. 598; and *African Guarantee & Ind. Co. v. Evans*, 1950 (3) S.A. 497 (A.D.).

If a motorist is blinded by the lights of an oncoming vehicle he should slow down, since there is the danger of his colliding with a pedestrian

walking on his incorrect side of the road and being temporarily invisible to the driver (*R. v. Cowan*, 1948 (1) S.A. 59 (N)).

(d) ANTICIPATING SUDDEN MOVEMENT—WIDE BERTH

It is the duty of the motorist, in passing a pedestrian, to pass him at a distance reasonably sufficient to allow for any sudden movement or stoppage on the part of that pedestrian (*R. v. Roopsingh*, 1956 (2) P.H., H. 242 (A.D.); *R. v. Clarke*, 1924 N.L.R. at 350). Per Dove-Wilson J.P.:

'Now what the deceased was entitled to expect is the measure of the duty which was incumbent on the accused. His duty was to avoid the deceased by the exercise of due care. Everybody knows or ought to know that you cannot reckon on what a pedestrian will do on suddenly finding that a motor-car is bearing down upon him and is within a very short distance of him. He may remain rooted to the spot in terror, or jump in his excitement in any direction but the right one, and in any event, a motorist has no right to assume that the pedestrian will make no alteration in his mode of progression. His duty is to take due care that any such alteration as may reasonably be expected shall not result in a collision.'

The dictum of Dove-Wilson J.P. in *Clarke's* case (*supra*) to the effect that the motorist must provide for an 'unforeseen' movement on the part of the pedestrian was uttered *per incuriam* (*R. v. Sacco*, 1958 (2) S.A. 349 (N) at 351). See also *R. v. Ngwenya*, 1959 (4) S.A. 75 (T); *Sonday v. Norwich Union Fire Insurance Soc., Ltd.*, 1966 (3) S.A. 231 (N), and it should not, therefore be taken as an absolute and rigid one (*R. v. Grunes*, 1950 (4) S.A. 279 (N); *R. v. Nicol (infra)*). Where the chauffeur had sounded his **hooter** and the plaintiff **did not look round**, the Court held that he should have inferred that the plaintiff had not heard him, for drivers of cars should make allowance for the fact that, when a person suddenly finds a motor-car close behind, he may jump to the right or to the left (*McKenzie v. S.A. Taxi Cab Co.*, 1910 W.L.D. 232). It is negligence, therefore, for a motorist to go close up to a pedestrian from behind without satisfying himself that the pedestrian is aware of his presence (*Jones v. Willcocks*, 1935 N.P.D. 121). If the pedestrian, **unaware** of the approach of the car, involuntarily moves slightly forward or sways under such circumstances, he cannot be said to have been guilty of *culpa* (*R. v. Yule*, 1942 C.P.D. 462). In *Shand v. Weyhausen*, 1911 W.L.D. 169, however, two men were walking on a road and were overtaken by the defendant, who had slowed down to 4 m.p.h. At the last moment one of them sprang into the way of the car. Held, he could not recover damages. The same conclusion was arrived at in *S. v. Theron*, 1962 (2) S.A. 253 (C), where a motor cyclist, after seeing a pedestrian crossing a street and having swerved to his left to pass behind him, was confronted with the unexpected and unusual manoeuvre on the part of the pedestrian in suddenly stepping back two or three paces into the way of his cycle. Here the Appeal Court set aside the conviction.

In almost similar circumstances, the Court held in a civil trial that the action of the pedestrian was solely the cause of his own injuries (*Van Rooyen v. Rondalia Versekeringskorporasie van S.A., Bpk.*, 1968 (2) P.H., O. 53 (T)). Here, when the pedestrian plaintiff reached the middle line of the road, he looked to his left in the direction of defendant's car and stood still a pace or two beyond that line and then stepped back to the middle line. When, however, the defendant driver was some 10 to 15 paces off,

the plaintiff suddenly and unreasonably moved forward. Held, that judgment with costs should be granted to the defendant.

In *R. v. Grunes*, 1950 (4) S.A. 279 (N), it was held that where a pedestrian, when 4 feet away from the accused's line of travel, had stepped backwards and kicked out with his right foot in the direction of the car (the nose of which had already passed him), that the unusual action on the part of the pedestrian was not necessarily an involuntary jump or start occasioned by fear or shock due to the close proximity of the car, and that the conviction of the motorist should be set aside.

To pass a pedestrian, leaving only 12 inches of space between him and one's car, is certainly culpable (*R. v. Yule*, 1942 C.P.D. 462). See, also, *R. v. Thomas*, 1942 P.H., O. 40 (C), and *R. v. Hauptfleisch*, 1946 P.H., O. 34 (C). (See also *ante*, p. 408.)

(e) STANDING IN STREET

A motorist who runs down a pedestrian **standing** in the middle of the road can, as a general rule, find very little excuse for his actions, for he is on the **horns of a factual dilemma** since, either he was not keeping a proper look-out, or else he was travelling at an excessive speed in the circumstances (*Thornton v. Fisser*, 1928 A.D. 398 or had not allowed for some sudden movement on the part of the pedestrian by giving him a sufficiently wide berth (*R. v. Sacco*, 1958 (2) S.A. 49 (N)); see *ante*, p. 315 and p. 394, for the facts), because there is a presumption, in fact, of negligence where a motorist knocks down a solitary pedestrian in broad daylight (*Jones v. Willcocks*, 1935 N.P.D. 121). At night-time, or when conditions of visibility are not good however, it must be established that the pedestrian collided with was, or ought to have been, visible to the driver (*East London Municipality v. Van Zyl*, 1959 (2) S.A. 514 (E); *Hoffman v. S.A.R. & H.*, 1955 (4) S.A. 476 (A.D.) at 478). If, therefore, it is proved in a running-down case that the period of vision of a pedestrian by the driver of a motor-car was as much as three seconds, the conclusion may properly follow that the driver, had he exercised due care, could and should have avoided the collision (*Fallon's Estate v. Claret*, 1932 A.D. 177).

In *R. v. Jacobs*, 1941 C.P.D. 7, the accused was following a car which obscured his vision forwards. This front car swerved to its left to avoid a pedestrian standing in the middle of the road, but the accused ran into him and killed him. Held, that the accused should not have left the possibility out of his mind that there might be persons standing in the centre line waiting for cars to pass and he was accordingly found guilty of negligence.

For a case where the driver was held not to have been at fault see *R. v. Short*, 1927 C.P.D. 146, the facts of which case were, briefly, that the complainant pedestrians were standing, about midnight, in a main road about four yards from the kerb, looking at an advertisement sign. They were in the way of oncoming traffic, standing in a shadow and wearing dark clothes. Just as the accused came to the point where he should have seen them, he encountered a whirlwind of dust, upon which he immediately slowed down to about 10 m.p.h., but as he emerged from the cloud of dust he struck the complainants. Here the Court held that the complainants, in standing in the road as they did, were clearly negligent and that the

Crown had failed to prove that the accused's failure to hoot and/or to stop was the effective cause of the accident. This case was distinguished in *Wagenaar v. Thomas*, 1930 W.L.D. 81. It is no excuse, however, that the driver was dazzled by the lights of a car he had just passed, if he runs down and kills a pedestrian who is standing in a street under lights and who can be seen from about 100 yards (*R. v. Freeman*, 1931 N.P.D. 460), nor where he is temporarily blinded by the lights of a car behind him shining on to his mirror if he takes his eyes off the road, in order to turn the mirror to one side, and in so doing fails to see a pedestrian standing in a safety zone in the middle of the street (*R. v. Naude*, 1936 P.H., O. 25 (C), and J/C 558/36). (These so-called 'safety zones' have now, in most of the leading towns, been abolished, being replaced by properly kerbed traffic islands.)

(f) ALIGHTING FROM AN OMNIBUS

It is the duty of a passenger, when alighting from a tramcar, to **look back** and notice the state of the traffic in the road in order to observe what traffic is approaching and then accommodate his actions accordingly for his own safety as well as that of approaching traffic (cf. *S. v. Theron*, 1962 (2) S.A. 253 (C)). It is also the duty of the driver of a vehicle to pass tramcars with caution, and if he fails to keep his vehicle under reasonable control in passing, and thereby injures a passenger alighting from a tramcar, the driver of the vehicle may be held responsible, even though the passenger has failed to look back (*Beech and another v. Setzkorn and another*, 1928 C.P.D. 500 at 504, followed in *Singh v. New India Insurance Co., Ltd.*, 1966 (4) S.A. 154 (D) at 157; *Burkhardt v. Elias*, 1911 W.L.D. 199, and *R. v. Subel*, 1949 (3) S.A. 212 (T)). Per Gardiner J. in *R. v. Van der Spuy* (C.P.D. April, 1926):

'Apart from any regulation it seems to me that the attitude of the motorist who is about to pass a tramcar that has stopped to set down passengers, even if it commences to move, is to see that no passengers, who have alighted from the tramcar, are passing over from that tramcar. The regulations make it right for a motorist to pass on the right side of a tramcar when it is resorted to, but the regulations make it subservient to the common-law attitude of a man driving to the safety of the public. What does a man expect when a tramcar stops to set down passengers? One must expect the **ordinary carelessness of the public** who, having alighted from the car, wish to cross to the other side of the road. They will pass from behind a car—one sees it constantly. Every motorist sees it. When the accused saw the tramcar stop he must have known that it is quite a common thing and he might have anticipated that someone would get down and proceed from behind it to the other side of the road. He might also have expected that any person getting down and **emerging from behind** cover of the car would not look towards Cape Town but towards Sea Point end. That is where the ordinary man would look first and that is where the deceased looked. It was the duty of the accused to keep a proper look-out and he had no excuse for not fulfilling that duty.'

See also *Harmsworth v. Smith*, 1928 N.P.D. 174, and *R. v. Cooper*, 1938 N.P.D. at 183.

Cases

In *R. v. Marais*, 1932 P.H., O. 42 (C), the accused, in passing a tram, went on to the wrong side of the road and knocked down two persons who came suddenly from behind the tram. In this case the Court decided that the accused did a very risky thing in trying to pass a tram, which was drawing up, and in going on to the wrong side of the road; that while this, in itself, was not per se negligence, it was nevertheless a situation fraught with

great danger, and a situation in which the driver of a motor-car had to exercise the greatest care; that the accused had not seen the pedestrians in time because he had not, kept a sufficiently good look-out and was therefore guilty of culpable homicide. This case is to be contrasted with *Senekal v. R.*, 1931 P.H., O. 9 (E), where the pedestrian ran 16 feet from the tram into the accused's car (*post*, p. 336).

In *McLean v. Bell* (1931) 147 L.T.R. 262 (H.L.), the plaintiff had, on alighting from a tram, proceeded from behind the tram to cross the street. As she was on the second set of rails a motor-car, driven by the defendant and coming in the opposite direction, knocked her down. On appeal to the House of Lords their Lordships held that, since the defendant had had an opportunity of avoiding her negligence had he kept a proper look-out (i.e. by looking in her direction), she was entitled to damages.

Where two children, after alighting from the bus, stood off the tarred portion of the road, and there was nothing in their attitude to show that they were restless or that they would suddenly leave the place where they were standing, it was ruled that appellant was entitled to assume that they had seen his approach and that it would be safe for them to proceed (*R. v. Momberg*, 1953 (2) S.A. 685 (O)).

(g) GROUP IN, OR AT, SIDE OF ROAD

A motorist who observed a group of pedestrians standing at the side of a road should make allowances for the possibility of one, or some of them, making a sudden movement into the way of his approaching vehicle (*R. v. Ngwenya*, 1959 (4) S.A. 75 (T)). The necessity for providing for this contingency was emphasized in *Rawles v. Barnard*, 1936 C.P.D. 74, the facts of which were that defendant was driving his car at a speed of over 40 m.p.h. when he saw, about 150 yards ahead of him, three women, one of whom was the deceased, and a man walking in the road away from him. He hooted and one of them called out, 'Pas op, hier kom die motor aan', and they at once separated, two going on to the grass on accused's left and two on to the grass on his right side of the road. When defendant was about 100 feet away deceased apparently made up her mind to join her daughter on the other side of the road and, without looking or taking any precautions whatever, proceeded to cross the road and was struck by the defendant. There was no other traffic at the time. Held, he had been negligent. Per Davis J.:

'It was the duty of the driver to keep his eyes on the pedestrians. But particularly in my mind is this so when a group has divided into two and gone on to two opposite sides of the road. Experience unfortunately shows us that when that group consists of **animals**, when of children or **Natives** usually, and even of adults—and more particularly of **women**—they not infrequently try to join up again at the last minute and rush across in front of the oncoming car. Both were negligent at the time and thus neither could avoid the result of each other's negligence.'

The appeal was accordingly dismissed. See, also, *R. v. Mitcheley*, 1939 E.D.L. 225. The same caution should be shown on the part of a motorist who approaches a crowd of people collected on the side of the road (*R. v. Ngwenya*, 1959 (4) S.A. 75 (T)). In *R. v. Sprenger*, 1920 E.D.L. 316, the accused had driven past a party of Natives working at the side of the road, causing them to scamper in all directions for safety. One tried to climb a bank and, on failing to do this, dashed across the road to the other side, where he was struck and injured by the accused's car. Held, that the accused's conduct could not be excused.

In *R. v. Sweidan*, 1939 E.D.L. 32, five Native children were on or about a roadway and could be seen by the accused some 100 paces away. Three had crossed the road. Accused saw a 6-year-old child when he was seven

paces off, and hooted. She was then three and a half paces from the portion of the road used by cars. She then ran across the road and was knocked down. Held, accused was rightly convicted of negligence.

3. CHILDREN

Young children should not be credited with the same presence of mind as grown-up people, and the driver of a car has to be prepared for sudden movements on the part of young children which he would not have to be prepared for in the case of adults. Per Tatham A.J.P. in *R. v. Khan*, 1930 N.P.D. 151, quoted with approval in *R. v. Naidoo*, 1932 N.L.R. 343, by Lansdown J., who also said:

‘There is a duty upon a motorist, on seeing children in the road before him, to suppose the possibility that they may behave as normal children are often wont to do, and may not show the mature intelligence and presence of mind of a reasonable adult. Consequently the motorist must contemplate that there may, at the last moment, be a **stupid decision** on the part of the children or some of them to change their position and that they may thus get into the line of his route. A motorist must therefore, when approaching children, have his car under such control as will enable him to pull up at short notice. If he does not do this but continues with his foot on the accelerator, moving at the same rate as he would have travelled had the children not been there and a collision occurs with the children, which would not have occurred if he had reduced his speed, then the probability is that the collision will be due to his conduct and that such conduct will, in the circumstances, be negligence for which, and the consequences of which, he will be criminally liable.’

The duty of the motorist, therefore, on approaching a group of young children close to the side of the road, is not only to slow down and to pay special attention to them, but also to deviate his course in order to give them as wide a berth as is reasonable in the circumstances (*S. v. Moodley*, 1966 (1) S.A. 248 (N) at 249–50). See, also, *South British Insurance Company v. Smit*, 1962 (3) S.A. 826 (A.D.) at 837; *De Bruyn v. Minister van Vervoer*, 1960 (3) S.A. 826 (O) at 834; *S. v. Kee*, 1961 (4) S.A. 3 (E); *Borean N.O. v. Shield Insurance Co., Ltd.*, 1967 (3) S.A. 701 (C) and *R. v. Mitcheley*, 1939 E.D.L. 225. In *R. v. Elliott*, 1939 N.P.D. 322, it was decided that the driver should be still more careful when the child is seen to be **running** than when he is merely walking or standing still. The extent of the special vigilance and care which a motorist is required to exercise in the proximity of children must depend on the particular circumstances and their apparent age (*R. v. Pillay*, 1951 (2) P.H., O. 12 (N)). See, also, *Adams v. Sunshine Bakeries*, 1939 C.P.D. 72; *R. v. Sweidan*, 1939 E.D.L. 32; *R. v. Subel*, 1949 (3) S.A. 212 (T), and also *Jones v. Willcocks*, 1935 N.P.D. 121, where the Court held that the defendant should have realized that a child of 6 years might well be expected to make a sudden dash one way or the other as the child did in this case. Per Jones A.J.P. in *R. v. Press*, 1938 C.P.D. 356:

‘It is well known that the actions and movements of children are often spasmodic and unaccompanied by the reasonableness supposed to be attendant upon those of adults.’

It has accordingly been held that a driver is not entitled to overtake children unless he has reason to be satisfied that they were aware of his approach (*Ngcobo v. Hamlyn*, 1948 (4) S.A. 547 (N); *R. v. Pretorius*, 1947 (1) S.A. 232 (N)).

The fact that the child has been left unattended by the parent or adult will not excuse the driver from liability if he could, by the exercise of proper care, have avoided the accident (*Johannesburg C. & S. Tramway Co. v. Doyle* (1894) 10 O.R. 205; *Taylor v. Dumbarton Trams*, 1918 S.C. (H.L.) 96, and *R. v. Kew & Jackson* (1872) 12 Cox 355). But if the child is in charge of an adult who can be reasonably assumed to be taking care of it, the degree of care required of the motorist is reduced or even excused, unless there is no good reason for the motorist to believe that the adult is in a position effectively to prevent the child from exposing itself to danger (*Cakate v. Provincial Insurance Co., Ltd.*, 1963 (2) S.A. 607 (D)). For the position regarding the liability of the authorities in permitting children to ride in the front of trams (should an accident occur to one of them), see *Johannesburg C.C. v. Venter*, 1936 T.P.D. 287 (*post*, p. 464).

The State or plaintiff must, however, prove that the children were in a position where they could, or **ought to, have been observed** by the accused. If, therefore, the evidence is equally consistent with their having emerged from a gate in the fence, so short a time before the impact that the accused could not have avoided them had he been keeping a proper look-out, then no verdict of negligence would be justified (*R. v. Green*, 1939 N.P.D. 377). The position would be the same where a child suddenly emerges from behind a parked car where his presence was entirely unexpected (*Borean N.O. v. Shield Insurance Co., Ltd.*, 1967 (3) S.A. 701 (C) at 703; *New Zealand Insurance Co., Ltd. v. Karim*, 1963 (4) S.A. 872 (A.D.) at 875). If, moreover, the children are standing well away from the road or quietly on the pavement, and then unexpectedly dash across the road, the motorist cannot be held blameworthy (*R. v. Pillay*, 1951 (2) P.H., O. 12 (N)). It is axiomatic, therefore, that the stringent duty stated above would devolve upon the motorist only when he can see the child or children in question, for he is under no obligation to guard against the possibility of a child's unexpectedly emerging from a house or garden at the side of the road (*S. v. Harvey*, 1962 (3) S.A. 119 (E) at 120) (see *ante*, pp. 25-7).

Contributory negligence and apportionment: A child over 7 years of age can be *culpa culpex* and his negligence can give grounds for an apportionment of damages (*Neuhaus N.O. v. Bastion Insurance Co., Ltd.*, 1968 (1) S.A. 398 (A.D.)), much depending, in this regard, upon the circumstances and the experience, age and intelligence of the child (*Nieuwenhuizen N.O. v. Union & National Insurance Co., Ltd.*, 1962 (1) S.A. 760 (W) at 761; *Jones v. Santam, Bpk.*, 1965 (2) S.A. 542 (A.D.) at 551-4). In the latter case the child's negligence gave grounds for apportionment. See, also, *Geldenhuis v. Rondalia Versekeringskorporasie, Bpk.*, 1966 (1) S.A. 724 (O) at 728. A child under 7 years is, however, *culpa incapex* and no apportionment may be made (*De Bruyn N.O. v. Minister van Vervoer*, 1960 (3) S.A. 820 (O); *Van Oudtshoorn v. Northern Assurance Co., Ltd.*, 1963 (2) S.A. 642 (A.D.) at 648).

Cases

The following are instances where the driver concerned has been found to have been guilty of **negligence** in the circumstances:

The accused, while driving a lorry at a speed of 25 m.p.h., on a road which ran along a causeway which was about 17 feet wide, saw two children, about six and nine years of

age respectively, standing at the side of the road about 5 feet from his right-hand side of the road. He did not reduce his speed but accelerated in order to take a rise in front of him. He says he hooted but the children did not move or look in his direction. The children suddenly darted across the road and one of them was killed (*R. v. Khan*, 1930 N.P.D. 151).

An accused, a motorist, saw two children ahead of him riding on a bicycle on a bad country road. He hooted several times and the bicycle veered to the right-hand side of the road. He then essayed to pass the bicycle on its left (the wrong side) at a speed of some 10 m.p.h. Just as he was passing the bicycle swerved and came into collision with his front mudguard. Held, he was guilty of negligent driving (*R. v. Press*, 1938 C.P.D. 356). Per Jones A.J.P.:

'There can be no question but that the driver of a vehicle approaching from behind two young children on a bicycle on a rough road must exercise special care, for it is well known that the actions and movements of children are often spasmodic and unaccompanied by the reasonableness supposed to be attendant upon those of adults. And there seems to me to be no ground for the argument that, when the rider of the bicycle, after the warning hoots of the accused, crossed from left to right of the centre of the road, the accused was entitled to assume that the movement was an invitation for him to pass on the left.'

The accused had left a berth of one yard between his car and some children on the road, one of whom moved into the way of his car and was killed. Held, that the accused had rightly been convicted of culpable homicide even though he was following a line of traffic which had also passed the deceased at the same distance (*R. v. MacIntosh*, 1934 N.P.D. (J/C 587/34), and *R. v. Katz*, 1937 E.D.L. (J/C 57/1937)).

Where appellant had seen a child run into the middle of the road and stop there, it was held that he should have slowed down to such a speed as to enable him to stop, for he could not reasonably anticipate that the child would stand still in the middle of the road (*R. v. Volker*, 1947 P.H., O. 3 (N)).

To drive a car at 25 m.p.h. through a village, and over and across a road where there are children about, is culpable (*R. v. Van Rensburg* (1942) *S.A.L.J.* 282).

The defendant was approaching a van which was stationary on the side of the road. Behind this van was a lorry where there were congregated a number of children who could easily be seen by the defendant owing to a bend in the road. Defendant, who was driving at about 25 m.p.h., did not slow down and, furthermore, passed the van with a clearance of only 3 feet though he could have allowed another 3 feet without being over the centre of the road, and, in so doing, knocked down a young child which had suddenly emerged from behind the van. Held, that the defendant either did see or should have seen the children, and he should have contemplated the possibility of there being other children about and obscured by the body of the van, and the possibility of one of such children running into the road, and that he was therefore guilty of negligence in passing the van at the speed which he did at and in giving it so little clearance (*Soper v. Watney*, 1934 C.P.D. 203).

The defendant's car was, contrary to the by-laws, passing a tram which had stopped, when he knocked down a boy 4 years old and fractured his skull. The road was entirely clear of other vehicles and the tram was 32 feet from the kerb, while the defendant's car was 10 feet from the kerb. The boy was proceeding from the pavement on defendant's left and was apparently engrossed in the tramcar, apparently not seeing the defendant at all until it was too late. Held, that the defendant was negligent and, further, a boy of four years, not being a responsible agent, could not be said to have been guilty of contributory negligence, and that the defendant was therefore liable in damages (*Harmsworth v. Smith*, 1928 N.P.D. 174).

The accused, on stopping his car, had seen a little girl playing in front of his car with a heap of sand on the pavement. On restarting his car he failed to notice that she had altered her position in such a way that she was on her knees in the gutter at a spot about 15 feet in front of the car, and ran over her legs. Held, that he ought to have seen her and he was in no better position than if he had seen her, and that he had therefore been rightly convicted (*R. v. Gordon*, 1935 P.H., O. 21 (T)).

S. v. Kee, 1961 (4) S.A. 3 (E): A motorist should recognize that if young children are on, or near, a road they are 'as wide as the road' and liable to get into his way without

warning and unexpectedly. Here two young children were standing about 6 inches from the edge of the kerb. As appellant approached, a van appeared from the opposite direction and he took his eyes off the children to observe it. When he looked back again one of the boys started to cross the street and collided with his car. Held, he should not have taken his eyes off the children.

Neuhaus N.O. v. Bastion Insurance Co., Ltd., 1968 (1) S.A. 398 (A.D.): Acts which, perpetrated by an adult, would be stigmatized as negligence would constitute negligence if perpetrated by a boy over the age of 7 years unless circumstances exist which show that he was not sufficiently mature or developed so as not to be able to control such acts. Here the child had run across the road (when called by a friend on the other side) without looking and without stopping to wait for traffic. Held he had been negligent and that his damages should be reduced by 50 per cent.

The following are instances where the driver concerned has been held **not culpable** in the circumstances:

The accused was passing a tram at a distance of about 16 feet on its left-hand side when a child ran across from behind the tram and was struck by the door-handle of the car. The child was evidently endeavouring to cross in front of another tram approaching from accused's rear. Held, assuming that the child took two seconds to run from the tram to the point of impact, the accused could not be said to have been negligent in that the presence of prospective passengers on his left may have accounted for a diversion of his attention on them for a slight period, thus preventing him from focusing his gaze on the spot where the child actually emerged, and he could not reasonably be expected to have anticipated a sudden rush by the little girl across the intervening space (*R. v. Senekal*, 1931 P.H., O. 9 (E)).

Appellant, driving a car along a national road, saw two Native children standing still about 4 feet from the tarred edge. He slowed down to about 35 m.p.h. The children were waving as the car approached, but when it was only 15 feet away, one of them darted in front of it and was killed. Held, allowing the appeal, that in the circumstances the appellant was not negligent (*R. v. Cajee*, 1946 N.P.D. 299).

Three children, aged 10, 8 and 5 years respectively, ahead of the motorist, looked round and went to the side of the road as he approached. At the last moment the child aged 5 decided to join his brother on the other side and was struck by the accused's lorry (*R. v. Hansen*, 1946 P.H., O. 26 (C)). The authority of this decision is doubtful for the reasons given *ante*, p. 421.

Appellant was driving his motor-car on a road and, when about 100 yards from an intersection and also when on the corner, blew his hooter. A wagon was approaching in the opposite direction, also on its correct side of the road. As appellant was passing through the intersection a child of about 6 years (respondent's) emerged from the wagon and ran across the street without looking in appellant's direction, and was struck by appellant's car. Held, that as there was no evidence to show that appellant might have expected children to be in the vicinity, he could not be said to have been guilty of negligence (*Kottler v. Jordaan*, 1930 T.P.D. 828).

The accused (in passing a lorry) had left a distance of 7 feet between himself and the lorry when a child suddenly ran out from behind the lorry and collided with his car. Held, that the whole case depended on the question whether the accused saw or should have seen that there were children around the lorry, and, as there was no evidence that he ought to have been aware of this fact, the conviction and sentence were, on appeal, set aside (*R. v. Woeke*, C.P.D. 11.5.1936 (J/C 284/36)). For other cases see *Noble v. Collinet*, 1916 C.P.D. 503; *Transvaal Administration v. Coley*, 1925 A.D. 24; *Lynch v. Nurdin* (1841) 1 Q.B. 29; *Latham v. Johnson* [1913] 1 K.B. 413; *R. v. Ngcobo*, N.P.D. 4/10/1933 (P.H., O. 18); *Bower v. Hearn*, 1938 N.P.D. 399; *R. v. Green*, 1939 N.P.D. 377, and *R. v. Goodbrand*, 1940 P.H., O. 30 (T). In the latter case it was held that, owing to the amount of traffic on the road at the time, the accused could not be expected to devote the whole of her attention to the children and to the possibility of their crossing the road foolishly in front of her car, and that she should therefore have been excused even from not seeing them at all (*sed quaere*).

4. ANIMALS

While the duties of the motorist in regard to animals are interrelated, it is nevertheless possible to analyse them and formulate his obligations into the following categories:

(a) SLOWING DOWN

Animals should not be credited with the ability to adjust their movements with that degree of foresight and care for danger which one would expect of human beings, and therefore it is the primary duty of the motorist on approaching animals on or along the road, to anticipate irregular movements and to moderate his speed to provide for any reasonably possible eventuality. It has accordingly been ruled that if he sees animals spread over the road, or even alongside the road, whether walking or cantering, he should proceed only with extreme caution (*Snyder v. Maree & Bosman (Pty.) Ltd.* (1942) *S.A.L.J.* 188). See, also *Naude v. Erwee*, 1932 O.P.D. 175.

The driver's duty to slow down would, naturally, depend upon how far the animal was from the roadway, what it was doing, and also, to some extent, whether the possibility of its movements away from the road, if startled, would be hampered by the existence of obstacles such as a fence, or the nature of the ground (*Klaas v. Serfontein*, 1940 C.P.D. 616).

Speed and clearance are closely related factors: the higher the speed, the greater should be the clearance between the car and the animal. The closer the clearance, the slower should be the speed (*Barkhuizen v. White*, 1949 (2) S.A. 116 (N)).

(b) WARNING

It is also necessary to warn the animal of one's approach, and if there is any person in charge of such animal he should also be given timely notice of the approach on the scene of the vehicle (*Lakier's Est. v. Van der Spuy*, 1945 P.H., J. 8 (W)). In this case it was ruled that a driver should not attempt to pass a horse-drawn vehicle unless he has reason to believe that the driver of the vehicle being overtaken has heard his signal, i.e. the hooter. The driver of a motor-car approaching a dog is not therefore entitled to assume, after sounding his hooter, that the dog will necessarily attempt to get out of the way (*Lewis v. Humphries*, 1913 T.P.D. 477). In this case the defendant, travelling at a speed of 15 m.p.h., saw a cart in front with a dog running alongside. He sounded his hooter when at a distance of 200 yards and again at a distance of 50 yards. At a distance of 20 feet he shouted to the dog, which was straight in front of the motor-car, but did not slacken his speed and ran over the dog. Held, that he had been negligent and liable in damages.

(c) MAKING ALLOWANCES FOR STUPID ACTIONS

Animals, like children, should not be credited with the ability to foresee possible dangers and to regulate their actions accordingly. Usually, if a horse, ox or donkey, has made up its mind to cross the road it will continue to do so despite continued hootings, and the only safe course is to proceed **behind it**. In this regard it has been ruled that, on approaching a group of animals on the sides of the road, the motorist should anticipate that one

or some of them may take it into their heads suddenly and at the last moment to cross the road for the purpose of joining the others on the opposite side (*R. v. Naidoo*, 1932 N.L.R. 343, and *R. v. Werner*, 1937 N.P.D. 310).

(d) ALLOWING SUFFICIENT BERTH

Closely related with the other duties of the driver is the precaution he must take to allow a sufficiently wide enough space between his vehicle and the animal which he seeks to pass, in order to allow for any unforeseen or stupid movement on the part of the animal concerned (*Naude v. Erwee*, 1932 O.P.D. 175; *Wernich v. De Villiers*, 1915 C.P.D. 581, and *Barkhuizen v. White*, 1949 (2) S.A. 116 (N)). In *Naude's* case the defendant had approached a dog, which was in the middle of the road, at a speed of about 15 to 20 m.p.h. He hooted when about 80 yards away and attempted to pass on the right of the dog, which, when he was about three paces away, suddenly turned to the right and was run over and killed despite the defendant's hooting, putting on his brakes and turning more to the right. The Court decided, however, that it was his duty either to make the dog aware (by hooting or otherwise) of his approach or to reduce his speed so as to be able to avoid a sudden movement on the part of the dog, and at the same time to give the dog so wide a berth as to be able to avoid any sudden movement on its part (*Feinberg v. Zwarenstein*, 1932 W.L.D. 73, applied). See, also, *R. v. Werner*, 1937 N.P.D. 310, where the accused negligently drove through a bunch of horses, and also *Barkhuizen v. White*, 1949 (2) S.A. 116 (N).

These cases should be contrasted with the decision in *Ashley v. Lumgair*, 1916 E.D.L. 37, the facts of which were that an ox suddenly ran from the side of the road into the way of a motor-car approaching at 10 m.p.h. and it was held that the action was so unexpected that the driver was to be absolved from blame.

The obligation to allow a sufficient berth when passing an animal is not limited to a duty to the animal itself, for there may be persons in the vicinity also. In this regard a peculiar position arose in the case of *Cowan v. Ballam*, 1945 A.D. 81, where the defendant had been driving his car in black-out conditions and saw a horse standing diagonally across the road. He assumed it was a stray, but while just passing it on its left side the deceased, who was in charge of the horse, emerged from the front of the horse, was struck by the defendant and killed. Held, that the defendant should have foreseen as a reasonable possibility that a man, **masked from view** by the horse, might move sufficiently to be injured if someone drove past the horse **so closely** as the defendant did, and that the latter had been negligent.

(e) FRIGHTENING ANIMALS

The timidity of some animals, especially in country districts, is a well-known fact, and it follows that the driver of a vehicle making a considerable noise should not pass so close to an inspanned horse as to frighten it and thereby cause damage (*R. v. Frans Radebe*, 1945 O.P.D. (J/C 122/46)). It is consequently the duty of the driver, when he observes that the animal he is about to pass is showing signs of restiveness or fright, to **slacken his**

speed and, if necessary, to **stop** altogether, if by doing so he can prevent an accident (*Adams v. Clarke*, 13 C.T.R. at 410). Thus, where the driver of a tram continued to approach a horse which was shying and prancing and in an obvious state of fright, in spite of the shouts by the driver to the motorman to stop the tram, with the result that a collision ensued, the Court found that the motorman was clearly negligent (*Metropolitan Tramways Co. v. Stubbs*, 1924 C.P.D. 446). If, however, the owner is careless in the control of his horses he will in his turn be liable for damage caused by their bolting (*Page v. Malcomess & Co.*, 1922 E.D.L. 284).

The fact that a collision occurs by reason of the fact that the animals have been frightened does not necessarily raise an inference that the driver is blameworthy, for there must be some **causal connexion** between his negligence and their precipitate action. Where, therefore, some mules had been frightened by a train and had rushed towards the car of the defendant, who had been travelling at about 30 m.p.h. at night-time, the Court came to the conclusion that he should not be held responsible for damages occasioned by their being injured in the collision (*Van Niekerk v. Van Schalkwyk*, 1940 P.H., O. 11 (C)).

(f) VISIBILITY

All the aforementioned duties are based on the logical presupposition that the animals concerned are visible and should have been easily discernible to the traveller concerned. Where, therefore, two motorists had run over some sheep at night, the Appeal Court ruled that, while the motorist should be prepared to find objects in his way which closely resembled the colour of the road (and should exercise a high degree of care in their observation and avoidance), yet, if the animal in question is actually invisible until the motorist is so close that he is unable to avoid it, he cannot be held liable in damages for injuring it (*Cromhout & Dewing v. Green*, 1942 E.D.L. 238). A motorist should, however, anticipate that there might be cattle or sheep hidden behind a blind rise (*R. v. Venter*, 1959 (2) S.A. 520 (E); *Manderson v. Century Insurance Co., Ltd.*, 1951 (1) S.A. 533 (A.D.) at 539). In *Venter's* case it was ruled that the absence of herdboys with red flags should not have put the appellant off his guard. See, also, *Roche v. Louw*, 1916 C.P.D. 299 at 300.

The onus of proof is always on the plaintiff to establish the visibility of his animals (e.g. sheep) at night-time (*Bhyat's Store v. Van Rooyen*, 1961 (4) S.A. 59 (T)).

In *McArthur v. Burn*, 1953 (2) S.A. (S.R.) at 666, the respondent had driven a lorry at night **with lights which gave him insufficient visibility of only 15 yards, at a speed of 20 to 25 m.p.h.** He collided with appellant's cattle driven by drovers who had been provided with lanterns and a torch, but who, at the time of the collision, had carried no lights. Held, that as the respondent had an opportunity of avoiding the cattle he was liable in damages.

(g) STATUTORY PROVISIONS

The legislatures in the various provinces have specifically provided rules enforceable by penal sanction, in respect of the duties of **owners of animals** who allow their cattle, horses, sheep, etc., to be or stray on public roads. These are as follows:

125. (1) Subject to the provisions of subsection (2) no person shall leave or allow any bovine animal, horse, ass, mule, sheep, goat, pig or ostrich to be on any section of a public road where that section is fenced or in any manner enclosed on both sides, and no person shall leave such animal or ostrich in a place from where it may stray onto any such section of a public road.

(2) The provisions of subsection (1) shall not apply to—

- (a) any animal which is being ridden or is being used to draw a vehicle along a public road; or
- (b) any animal which is being driven from one place to another in such a manner as not to constitute a source of danger or injury to any person or vehicle using such road.

(3) In any prosecution for a contravention of subsection (1) it shall be presumed, until the contrary is proved, that any animal or ostrich referred to in subsection (1) was left or allowed to be on the section of the public road or place concerned by the owner of such animal or ostrich, and a section of a public road shall be regarded as fenced or enclosed along both sides even if there is any opening providing access to such road in the fence or other enclosure.

(4) No person shall drive any animal referred to in subsection (1):

- (a) along the roadway of a public road during the period between half-an-hour after sunset and half-an-hour before sunrise, unless such person carrying a red light visible in clear weather for a distance of at least 500 feet tends such animal or, in the case of a flock or herd of more than ten animals, a person tending such animals and carrying a light as aforesaid precedes and another such person carrying a light as aforesaid follows such animals.
- (b) along a roadway of a public road during the period other than that referred in paragraph (a), unless a person displaying in a conspicuous manner a red cloth, not less than twelve inches square, tends such animal or, in the case of a flock or herd of more than ten animals, a person tending such animals and displaying a cloth as aforesaid precedes and another such person displaying a cloth as aforesaid follows such animals.

(5) A person in charge of an animal on a public road shall tend it in such a manner as not to constitute an obstruction or danger to other traffic.

In *R. v. Venter (supra)* the appellant had, on coming over a blind rise at 65 m.p.h., collided with a flock of sheep. The two herdboys had been given red flags to warn oncoming traffic but the leading boy had omitted to give such warning to the appellant. There was sufficient room on the verge of the road for the sheep to have travelled on. Held, that the unusual concatenation of circumstances, taken cumulatively, in which the appellant found himself, were not such as the appellant should not have reasonably foreseen.

The matter of the liability of the owner of straying animals on the road has been dealt with (*supra*) pp. 168–75.

5. PASSENGERS

(a) IN CIVIL CASES

The driver of an automobile may be held liable for injuries caused to a passenger in his car owing to his careless driving (see *Haylet v. Steen*, 1936 P.H., O. 5 (T), but the passenger must be able to prove some specific act of negligence on the part of the defendant driver (*Herbert v. Miller*, 1935 P.H., O. 17 (C)). The driver can be liable to the owner for damage done to the car, even though the owner is the passenger sitting next to him (*Wright v. Stuttaford*, 1929 E.D.L. 377).

In *De Kock v. Van Blerk*, 1949 P.H., O. 2 (C), the Court found that although the cause of the accident was due to the act of the passenger in

suddenly grasping the steering-wheel, yet the driver could still, by the exercise of reasonable skill, have avoided the consequences of this action.

In *Harvey v. South British Insurance Co., Ltd.*, 1962 (2) S.A. 82 (N), the driver of a bus had forgotten that the bus was in starting gear, with the result that when he released his clutch, the bus jerked forward causing a passenger who was walking to his seat, in the aisle of the bus to fall, and it was held that she was entitled to damages, since she was not negligent in failing to hold on to the handrails before the bus had started to move.

It cannot be held in all cases, however, that the driver of a bus must always start so smoothly that he cannot dislodge a passenger who is near the exit of the bus, for buses are so constructed that it is impossible to require or expect completely jerk-free starts in all circumstances (*Kumalo v. South British Insurance Co., Ltd.*, 1963 (2) S.A. 352 (N)). This is so because the nature of a motor-bus being such as it is, that especially under modern conditions, it cannot be operated at a reasonable speed and in a reasonable manner without the passengers being subjected to movements which disturb their balance and it is to be expected of passengers that they will take reasonable precautions to protect themselves by holding on to the hand-rails provided for the purpose. Passengers are, therefore, to be expected to make use of such hand-rails or other places for holding on. On the other hand it is clearly the duty of the bus-driver to avoid **sudden and unexpected movements** which are not necessary and which can be a source of danger to passengers (*Labuschagne v. Stadsraad, Johannesburg*, 1967 (4) S.A. 99 (W) at 100-1). See also *Williams N.O. v. Eagle Star Insurance Co., Ltd.*, 1961 (2) S.A. 631 (C).

The leading English authority in this regard is that of *Western Scottish Motor Traction Co., Ltd. v. Fernie and others* [1943] 2 All E.R. 742 (H.L.), where the deceased was standing, because there were no vacant seats, and was thrown through the door of a bus, which had not been closed, because the driver took a sharp curve at too great a speed. He was not holding on to any part of the vehicle at the time and no bar or strap for this purpose had been provided. Held, that the driver had been negligent.

The duty of the driver of an omnibus is to look out for all obstructions and consequently, should the upper part of his bus brush against an overhanging tree, thereby breaking some of the windows and causing a splinter of glass to penetrate a passenger's eye, there will be a prima facie case of negligence on the part of the driver (*Radley and another v. London Passenger Transport Board* [1942] 1 All E.R. 433 (K.B.)).

While it would be culpable for a conductor to give a signal to a driver of an omnibus to proceed before all the passengers intending to alight therefrom have left the bus, there can be no responsibility for the intervening act of another passenger in giving such signal (in ringing the bell twice) when the conductor is upstairs collecting tickets (*Mottram v. South Lancashire Transport Co.* [1942] 2 All E.R. 452 (C.A.)).

Where a bus-driver was carrying passengers including several children and one of them, a boy of 14 years fell out of the entrance door of the bus, either because of his own fault or because he was accidentally pushed by another passenger, the Court found that there was no liability in the bus driver (*Santam Insurance Co., Ltd. v. Leal and another*, 1968 (4) S.A. 645 (A.D.) at 651-2). See also *Ndhlovu v. Durban C.C.*, 1970 (2) P.H., J. 9.

(b) CRIMINAL CASES

The duty of a driver to drive carefully and thereby ensure the safety of his passengers is axiomatic, consequently, should he cause the death of one of them by his careless or reckless driving, he would be liable to be charged and convicted of culpable homicide (*R. v. Lombard*, 1936 T.P.D. 89). Thus in *R. v. Van der Berg*, 1948 (2) S.A. 836 (T), where a lorry-driver had driven so close to a train that it seemed that he was about to collide with it and had thereby, by his action in so doing, caused a passenger to fear for his life and to jump off the lorry, it was ruled that the driver had rightly been convicted of causing the death of the said passenger. Per Maritz J.P.:

'... it is not for the driver to say: "If the passenger had kept his head he would not have been killed."'

In this regard the dictum of Swift J. in *Brandon v. Osborne Garrett & Co.* [1924] 1 K.B. is pertinent:

'... if a person is placed by the negligence of the defendant in a position in which he acts under a reasonable apprehension of danger and in consequence of so acting is injured, he is entitled to damages.'

The driver should ensure that his child passengers do not place themselves in a position in which they are likely to cause injury either to themselves or to others. This statement is supported by the decision in *S. v. Stavast*, 1964 (3) S.A. 617 (T), where a woman driver had permitted her child of 12 years to stand on the front seat next to her. When she was about to apply her brakes and swerve suddenly the child fell against the steering-wheel thereby causing the car to veer more to its right and to collide with the deceased. Held, that although this was a *novus actus interveniens* it was of a class or type which should have reasonably been foreseen by her.

(c) PASSENGER DRIVING

Only the person actually driving at the time is liable for any accident which might ensue. Thus, where the owner had permitted a passenger to drive a lorry which, when taking a bend, had overturned thereby causing the death of another driver, it was held on appeal, that the owner should not have been convicted in the absence of evidence that he had had an opportunity to prevent the passenger-driver from doing what he did and had failed to take advantage of that opportunity (*R. v. Horn & Britz*, 1938 T.P.D. 174).

Interference by an owner-passenger with the driving of a vehicle may justify his conviction for negligence as was instanced in *R. v. Colyn*, 1939 P.H., O. 26 (C). Here he has suddenly and unnecessarily grasped the steering-wheel of the car, causing it to mount a pavement and kill a child standing thereon. The reason for such precipitate action was that he wanted to stop for a drink at an hotel which they were then in the act of passing. Held, on appeal, that the conviction of the owner-passenger should be confirmed.

(d) LEGISLATION

Section 119(1) of the Ordinances now makes it an offence for the **driver** to permit any person to occupy any position on his vehicle which may prevent him from exercising complete control over the movements of the

vehicle (subsection (c)) while subsection (d) makes it an offence for the driver to permit any person to take hold of, or to interfere with, the steering or operating mechanism of the vehicle. Again subsection (j) prohibits the driver from permitting any person or animal to occupy the roof, or step or running board of such vehicle while it is in motion. In section 119(2) the **passenger**, on the other hand, is prohibited from interfering with the steering or operating mechanism whilst the vehicle is in motion, unless the driver is no longer capable of steering or controlling the vehicle. Nor may such passenger permit his body to protrude beyond the vehicle (presumably while the vehicle is in motion) (section 119(3)). Again, no person shall enter or alight from any vehicle upon a public road unless such vehicle is stationary and unless he can do so with safety to himself and other users of the road (section 119(4)). It would seem (although the legislation is silent on this point) that, under the common law, any driver who allows or permits contraventions of subsections (2), (3) and (4) would also be liable as a *socius criminis* to the offence.

For a full and further discussion on this topic see the chapter on Carriers and *ante*, p. 177 and *R. v. Dube*, 1948 (3) S.A. 360 (A.D.).

Volenti?: A person who knows that the driver is under the influence of liquor to the extent of not being able to drive safely, does not lose his right to damages for injuries caused in a collision due to careless driving, even though he appreciates that there is some danger and has had an opportunity of leaving the car before the accident (*Dann v. Hamilton* [1939] 1 All E.R. 59 (K.B.)), since knowledge of drunkenness does not necessarily import consent to negligent driving (*ibid.* at 62-7, 63-4), but, as was pointed out (p. 64) there might be cases where the drunkenness of the driver is so extreme and so glaring that to accept a lift from him would be *volenti*.

A peculiar position arose in the case of *Netherlands Insurance Co. of S.A., Ltd. v. Van der Vyver*, 1968 (1) S.A. 412 (A.D.), where the plaintiff who was a private detective engaged by O's wife to trap O, jumped on to the bonnet of O's car while it was moving slowly. In order to get rid of him, O drove at a high speed for a distance of 4 miles swerving from side to side causing plaintiff to fall off. Held that he had been the victim of O's exclusive negligence and that there had been no voluntary acceptance of the risk.

A bus-owner who undertakes for reward to take **small children** to and from school, should provide a door under the control of the driver to prevent them from alighting while the bus is still in motion (*Eggeling v. Law Union & Rock Ins. Co., Ltd.*, 1958 (3) S.A. 592 (D) at 596). In this regard there is a statutory duty not to permit passengers of a public bus to alight while the bus is still in motion (section 98(4) of the Ordinances, but where the exit door is behind the driver, this duty devolves upon the conductor and not upon the driver (*R. v. Dhlomo*, 1948 (4) S.A. 725 (N)).

6. TRESPASSERS

Whether a motorist is liable for damages to a person who is a trespasser on his vehicle, owing to some negligent conduct on the motorist's part, is a difficult, controversial topic. In *R. v. Matsepe*, 1931 A.D. 150 (followed in *R. v. Williams*, 1943 E.D.L. at 230), the facts were that the accused, when out delivering parcels, rounded a corner at a speed of 5 m.p.h. and

negligently collided with a tree on the footpath. A small Native who was, unbeknown to the accused, sitting at the back of the lorry with his legs dangling down, sustained injuries from the effects of which he died and the accused was held to have been rightly convicted. In the Fourth Edition of this work the correctness of the decision in *Matsepe's* case was questioned and such contention has found support in the judgment of Steyn J.P. in *S. v. Van der Mescht*, 1962 (1) S.A. 521 (A.D.) at 530. However, while it is clear law that a person is not liable for the safety of a trespasser of whose presence he was unaware (see *Farmer v. Robinson G.M.C.*, 1917 A.D. 501), in *Matsepe's* case the deceased was one of other passengers, known by the accused to have been on his lorry, and to whom he certainly owed a duty to drive carefully, consequently the fact that one of his passengers was a trespasser made no difference in this regard (see *R. v. John*, 1969 (2) S.A. 560 (R.A.D.) at 567, wherein it was held that, on this basis, *Matsepe's* case had been correctly decided). Undoubtedly, if the deceased had been the only passenger on the appellant's lorry the decision in *Matsepe's* case would have gone the other way.

In English law a party is not liable for damage done to trespassers unless it is shown that he could have foreseen the possibility of there being trespassers on his vehicle (*Lynch v. Nurdin* (1841) 1 Q.B. 29, and *Lygo v. Newbold* (1854) 9 Exch. 302), otherwise the only duty owed to the trespasser is to refrain from deliberately injuring him (*Addie v. Dumbreck* [1929] A.C. 358). (See *ante*, p. 199.)

CHAPTER XX

DUTY TO OTHER VEHICLES

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1. HOOTING

The obligation to appeal to the auditory senses of other wayfarers and users of the road, in order to apprise them of the imminent approach of one's vehicle into their immediate vicinity and thus warn them of the impending dangerous proximity of one's conveyance to their persons, is one as old as human civilization itself and dates back to the beginnings of

time when early man first invented the wheel as an aid to his progression from one locality to another. Vocal calls, trumpets, bugles and bells have been utilized for this purpose, while today we have the bells of the fire-engine and cycle, the siren of the ambulance and electric train, the whistle of the steam-engine, and the hooter of the automobile. It is axiomatic, therefore, that no reasonably careful driver will approach another person, who is ignorant of his proximity, without giving him adequate and timeous warning of the fact (*Johannesburg C.C. v. Public Utility Transport Corporation*, 1963 (3) S.A. 157 (W) (for the facts of which see *ante*, p. 378)). A driver should therefore notify the driver of the vehicle before him, and of persons who may be in front of that vehicle, that he is about to pass (*R. v. Freeman*, 1931 N.P.D. 460). Per Lansdown J.:

'Where reasonably necessary he must give due warning of his approach to persons who are on the roadway . . . when passing a vehicle going in the same direction he should sound his hooter so that the driver thereof and pedestrians and the drivers of vehicles who may, by the car proposed to be passed, be shut out from his vision, be warned of his approach.'

It should be borne in mind, however, that the driver's duty does not begin and end with merely hooting, for if it appears to him that the pedestrian or cyclist or horseman ahead of him has **not heard** the warning that has been given, or is not aware of his imminent approach, then the driver should make an **adjustment of his speed and course** in order that he may adequately meet with such requirements as the necessities of the situation demand (*Bezuidenhout v. Berman*, 1929 O.P.D. 148). Per McGregor A.J.P.:

'A factor in the situation before us is furnished by the hooter. Now there is no magic about the driver's hoot per se, nor is it merely a recognized item in automobilist procedure. Its function, in a case like that before us, is to warn the pedestrian ahead of the approach of the car from behind; its virtue consists herein, that it is calculated to avoid the coming into being of a dangerous situation. Two further remarks from the *S.A. Taxi Cab* case may be quoted here: "When the chauffeur had sounded his hooter and the plaintiff did not look round, the chauffeur should have inferred that the plaintiff had not heard it", and again, speaking of hooting by the driver, he said that this "was only part of his duty. It was also his duty to avert an accident if reasonably possible."'

See also *R. v. Subel*, 1949 (3) S.A. 212 (T), and *R. v. Hoffman*, 1952 (1) P.H., O. 1 (E); *Whatley v. Dixie*, 1927 E.D.L. 203; *Bloch v. S.A.R.*, 1939 N.P.D. 106. In *Beswick v. Crews*, 1964 (3) S.A. 744 (E) at 747, it was held that, even when a wind is blowing and the vehicle is a noisy one (e.g. a lorry), there is no duty upon the driver thereof to keep his window open so that he can hear the hooter of an overtaking car (*sed quaere*).

The essential feature of the warning hoot is that it should be given **timeously**, that is to say, warning should not be given when the driver is too far away for the party concerned to notice it (*R. v. Sprenger*, 1920 E.D.L. 313), nor should it be given when too late or in circumstances when, instead of acting as a warning, it is merely an **alarm** (*S.A. Taxi Cab Co. v. Johannesburg Municipality*, 1910 W.L.D. 124; *Katzenstein v. Duvenhage*, 1929 N.P.D. 294; *R. v. Mouton*, 1948 (2) S.A. 56 (T)). In *Katzenstein's* case the driver hooted when about six paces from the plaintiff, who thereupon in his fright, jumped back in his instinctive effort to avoid

the danger and was injured. Held, he was entitled to damages. See, also, *Bezuidenhout v. Berman* (*supra*) where McGregor A.J.P. added:

'And after that there is that crucial and close hoot—which is distinctly material here, coming as and when it did. For that at once put the wayfarers, and was calculated to put them, off their balance. Had the movement towards the car been something initiated without any outside cause—something done of free volition—it might possibly have borne the character of negligence; but here it was in a sense involuntary, and a natural movement, originating out of and induced by, the sudden alarm caused by the hoot. That which is set up as affording ground for defence was something for which the defendant was himself responsible, and for its consequences he must be deemed liable.'

If therefore, a road user is unaware of the imminent approach of a motor vehicle and then, upon suddenly discovering that it is bearing down upon him, jumps in his terror in the wrong direction, the driver of that vehicle will be deemed to have acted culpably (*R. v. Sprenger* (*supra*)).

In *Davies v. Crossling*, 1935 W.L.D. 107, the defendant came upon the plaintiff, who was crossing a street and at the same time examining a foot-rule without paying any attention at all to the traffic. He was also talking to his companion beside him. The defendant knew that the plaintiff was unaware of his approach, but waited till he was 4 feet from the latter and then, apparently in irritation at the plaintiff's behaviour, blew his hooter. A collision resulted owing to the fright received by the plaintiff, and he was awarded damages. It follows that where a driver sees an inattentive pedestrian some 10 to 15 paces away, his duty is to hoot and not merely to stop (*S. v. Shimbata*, 1966 (1) S.A. 771 (N) at 775). In this case the pedestrian walked on and into the accused's car and was injured, an event which would not have happened if the latter had hooted.

The necessity of hooting at **intersections** is one which must depend on the circumstances of each particular case. At a blind corner, where there is likely to be much traffic, there can be no doubt that an intimation of one's presence to others who might be approaching is necessary. On the other hand, one is not obliged to hoot at each and every cross-street (*R. v. Havenga*, 1935 C.P.D. (J/C 568/35)). Per Watermeyer A.J.P.:

'It is true that he did not hoot and the magistrate seems to regard his not hooting as negligence. I am not prepared to lay down that it is negligent for a motorist approaching an intersection of two streets not to hoot. If motorists had to hoot at every intersection the din would be unbearable, and one must have regard to what one knows of traffic conditions in cities.'

The fact that there is **no answering hoot** to one's signal does not justify the belief that the road is clear (*R. v. Richardson*, 1936 P.H., O. 21 [T]). Moreover, if a driver behind another vehicle has seen that the driver of the vehicle ahead of him has signalled his intention to turn to the right, the former is not entitled to endeavour to pass merely by sounding his hooter and expecting that the latter will refrain from making his intended turn (*Premier Milling Co., Ltd. v. Bezuidenhout*, 1954 (4) S.A. 625 (T)). See also *post*, p. 448).

Unnecessary hooting

Section 122 of the various provinces have now made it a criminal offence for any person in charge of a vehicle to use his hooter except when such use is necessary in order to comply with the provision of the Ordinance

or on the grounds of safety. In other words, it must not be employed as a means of signifying the arrival of the driver and of bidding his intended passenger to make her (or his) appearance.

Cases

The following are cases where the fact that the driver has failed to hoot has been considered to be an element of negligence to be weighed against him:

Where he endeavoured to pass a car ahead of him without warning the driver thereof and the plaintiff on the street in front, that he was about to perform this manoeuvre (*Wagenaar v. Thomas*, 1930 W.L.D. 81; *R. v. Freeman*, 1931 N.P.D. 460).

Where he endeavoured to pass a dog in the middle of the road, without letting the dog know he was approaching (*Naude v. Erwee*, 1932 O.P.D. 175).

Where, when about 200 yards from a cyclist, whom he was overtaking, he sounded his hooter, but did not give any further warning of his approach. As he drew near the cyclist turned into the way of his car (*Whatley v. Dixie*, 1927 E.D.L. 203).

Where a motorist passed a party of Natives working at the side of the road, causing them to scamper in all directions for self-preservation, without giving them adequate notification of his approach (*R. v. Sprenger*, 1920 E.D.L. 313).

In the following cases it was held that failure to hoot was **not negligence** in the circumstances:

Where the accused was passing a tram at a distance of some 16 feet and a child ran from the tram, across the intervening space, into his car (*R. v. Senekal*, 1931 P.H., O. 9 (E)).

Where the accused was approaching a cyclist, who was proceeding from the opposite direction and who, at the last moment, when 9 yards away from the accused, suddenly swerved into the latter's way (*R. v. Molife*, 1935 E.D.L. 252).

Where accused, in reversing from a narrow passage, hooted loudly, but the deceased, whose hearing was good, nevertheless protruded herself into the way of the car as it was slowly emerging (at a speed of 4 to 6 m.p.h.) into the public street (*R. v. Anthonie*, 1929 O.P.D. 78).

Where, though he failed to hoot, the deceased pedestrian was nevertheless aware of his approach (*R. v. Freeman*, 1931 N.P.D. 460).

2. SIGNALLING

The duty to indicate to others which particular manoeuvre the driver is about to make is prescribed by regulation and devolves itself into an examination of his duties to signal his intention to (a) turn, or (b) stop, or (c) turn right-about, or (d) overtake a vehicle.

(a) INTENTION TO TURN

A person who meets a vehicle travelling towards him is entitled to assume that such vehicle will maintain its apparent course, and therefore it is necessary for any vehicle driver who wishes to change his direction and turn into another street, to give adequate and conspicuous warning of his intention to do so (*Uys v. Uys*, 1927 A.D. 394. See also *R. v. Meiring*, 1927 A.D. 41; *Montgomery v. Hulston*, 1917 A.D. 183; *R. v. Pieters*, 1928 S.R. 100, and *R. v. Meyer*, 1935 P.H., O. 9 (T)), for a given signal implies that the driver intends to carry out what is represented by that signal in terms of the rules of the road (*Tomlinson v. Cawse*, 1926 E.D.L. 9). If however the driver is suddenly faced with a condition of emergency, wherein he has

no time to give the requisite signal to stop or turn, his failure to give the prescribed warning signal will be excused. (See section 111 of the Ordinances.) The warning signal, indicating an intention to turn, is in these modern times usually effected by means of the vehicle's direction indicator or winking lights. Nevertheless a caution is expressed by Steyn J. in *Davidson v. Cape Town C.C.*, 1965 (2) S.A. 559 (C) at 562, that, if there is a reasonable possibility that a driver's direction indicator would not be observed either by approaching or following traffic, he should give some other signal. Presumably he means a hand signal. This caution would apply with greater force where the direction indicator takes the form of winking lights, nowadays installed in most modern vehicles, when the sun is shining on them from behind or from in front thus making it difficult for following or approaching traffic clearly to discern the signal to turn.

It is not sufficient that the driver merely puts out his hand or direction indicator before turning, since reason and common sense dictate that his signal must be **timeous and adequate** in the circumstances (*R. v. Harbottle*, 1934 C.P.D. (J/C 510/34)). In *R. v. Bowen*, 1929 T.P.D. (unreported), Greenberg J. said:

'I think it is time that motorists realized that they do not discharge their whole duty by pushing out their hand at the last moment just as they are going to turn.'

Such signal is, however in reference to **oncoming traffic**, only an indication of the driver's intention to turn at an **opportune moment** and to carry out the manoeuvre in a **reasonable manner without incommoding** either the following or the approaching traffic (*Keuning v. London & Scottish Assurance Co.*, 1963 (3) S.A. 609 (D) at 612; *Bell v. Minister of Economic Affairs*, 1966 (1) S.A. 251 (N); *Vervev v. Malherbe*, 1959 (1) S.A. 884 (C)). These decisions would therefore, overrule the dictum of Wessels J.A. in *Milton v. Vacuum Oil Co.*, 1932 A.D. 197 at 205, to the effect that he 'knew of no rule of the road stipulating that a driver may turn only when there are no vehicles which may be interfered with', but is in conformity with his further remarks that

'... Where there are two streams of traffic in opposite directions, a person in a vehicle proceeding in one direction is entitled to assume that those travelling in the opposite direction would continue their course and that they would not suddenly and inopportunately turn across the line of traffic. But he could only assume this until he was shown a clear intention to the contrary; a person who wishes to cross the line of traffic and turn into a side street is entitled to do so but he must give **ample warning** of his intention both to vehicles **behind** him and to those **approaching** in the opposite direction, and he must do so at an opportune moment and in a reasonable manner. *De Villiers v. Peiser*, 1930 C.P.D. 361, only decided that a sudden and inopportune turn, without due warning, was negligent.'

This decision was followed in *Van Staden v. Stocks*, 1936 A.D. at 24.

Accordingly the signal must be sufficient to warn, not only the driver whose look-out is perfect, but also the moderately careful driver whose attention may stray for a moment (*Naidoo v. Durban Corporation and another*, 1961 (2) S.A. 775 (N)).

See also *Du Toit N.O. v. Volks*, 1938 P.H., O. 3 (C), and *Hobbs v. Guthrie*, 1938 C.P.D. 410. It follows, therefore, that there is no magic in the signal to turn to the extent of giving the driver some sort of right of way to oncoming or overtaking traffic for, having given an indication of his inten-

tion to turn, he must wait for an opportune moment and do so in a reasonable manner (*Heyns v. Jordaan*, 1943 (1) P.H., O. 15 (O)).

This does not mean, however, that other drivers are entitled to proceed regardless of his signal since, having seen it, they should also drive with caution. (See *post*, p. 442, and *Makasi v. Barnard*, 1942 (1) P.H., O. 1 (C), where it was held that the overtaking driver had failed to keep a proper look-out in not seeing the hand signal to turn given when he was 40 yards away. See also *R. v. Rahman*, 1950 (2) S.A. 44 (N)).

The signal must be given in such a manner that it can be **seen** by the driver of the approaching vehicle. Where, therefore, the complainant must, to the accused's knowledge, have been blinded by the bright headlights of the accused's vehicle, the Court held that the accused could not expect any practical purpose to be served by putting out his hand from behind such headlights (*R. v. Harbottle*, 1934 P.H., O. 21 (C)).

(b) SIGNALLING TO FOLLOWING TRAFFIC

A driver, who has given timeous and adequate warning of his intention to make a right-hand turn is not required, in the absence of special circumstances, to satisfy himself that the **following** traffic driver has observed that warning (*Nel v. Seafield*, 1968 (2) P.H., O. 29 (E), following *Naidoo v. Durban Corporation*, 1961 (2) S.A. 775 (N) at 777). See also *Wessels v. Rondalia Versekeringskorporasie van S.A., Bpk.*, 1969 (1) P.H., J. 7 (O). Per Kotzé J. in *Nel's* case:

'In the absence of special circumstances a driver who gives timeous and adequate warning of his intention to turn to the right, is entitled to assume that his signal has been observed and, therefore, that it will be heeded. This appears to me to be a practical and realistic test to apply whether in an urban or a rural area and whether by day or by night. If there is anything which should warn the driver that his signal may not be observed, or observed in time, then obviously he is not entitled to assume that that signal will be heeded; but unless there are special circumstances it seems to me that a reasonable driver is entitled to assume that following traffic will see and heed a signal which it has had ample time and opportunity to see and heed. If indeed this were not the case the practice of driving on the public roads would soon be restricted to drivers with nerves of steel or a gift of prophecy.'

Although the learned Judge treated rural and urban roads alike it is submitted that on rural national roads one should anticipate the possibility of following traffic, coming up at great speed, to pass by and therefore, the careful driver should also make use of his rear mirror as well as giving the appropriate signal (*Roux v. Osgood and others*, 1940 A.D. 139).

Much, therefore, would depend upon the distance separating the driver ahead from the following driver who seeks to overtake the former and whether he has had adequate time to observe, not only the signal to turn to the right, but also the braking lights of the driver ahead of him, which should have given him adequate warning of the intended manoeuvre (see *Brown v. African Guarantee and Indemnity Co., Ltd.*, 1968 (2) P.H., O. 46 (N)).

As a corollary to this rule, it is clear that if the signal to turn is not timeous and adequate the turning driver will be culpable (*De Beer v. Todd N.O.*, 1955 (1) S.A. 639 (S.R.); *Bell v. Minister of Economic Affairs*, 1966 (1) S.A. 251 (N) at 257, and *R. v. Rahman*, 1950 (2) S.A. 44 (N)).

As to the duty of the following traffic driver to observe the timeous signal of the driver ahead, and to take reasonably appropriate steps to avoid a collision, see *Makasi v. Barnard*, 1942 (1) P.H., O. 1 (C), and *Keuning's case* (cited *post*, p. 440).

In any event it is manifestly obvious that if no adequate signal is given to the driver behind, there is a very definite duty to satisfy oneself, by making use of the rear mirror of the car, that one can swerve to the right (in order to avoid an obstruction, e.g. a horse at night-time) safely and without colliding with a vehicle behind, the driver of which intends to overtake at the crucial moment (*Brown v. African Guarantee & Indemnity Co., Ltd.*, 1968 (1) P.H., O. 46 (N); *Beswick v. Crews*, 1964 (3) S.A. 744 (E), and 1956 (2) S.A. 690 (A.D.)).

In this regard it should be noted that section 113(1)(a)(i) provides that a driver, who intends turning to his right, should steer his vehicle as near as possible to his immediate right of the middle of the roadway on which he is travelling.

Where however the driver of a heavy and cumbersome truck knows that he is travelling under a disability in not being able to see traffic in the rear of him and who should have known that the mechanical indicator on his vehicle—his only means of warning possible overtaking traffic—might be obscured by the loose-flapping tarpaulin on his truck, it is negligence on his part not to satisfy himself, before taking a right-hand turn, that he could do so without endangering overtaking traffic (*Union Govt. v. Bergstedt*, 1946 C.P.D. 542).

(c) INTENTION TO STOP

A party following a vehicle ahead cannot reasonably be deemed to anticipate unexpected conduct on the part of the driver of that vehicle, such as a sudden stop without warning (*R. v. Wallach*, 1934 T.P.D. 293). It is therefore the duty of a driver to make sure that there is no vehicle behind him and so close to him that it would be endangered by his sudden stop. Accordingly he should, unless confronted with a sudden emergency, pay some attention to vehicles following him (usually by the use of his rear mirror) and should also give adequate and timeous warning to vehicle drivers behind him of his intention to pull up, and thereby avoid a collision with the latter. Such warning is given usually by the appropriate hand signal during day-time and by his rear stop-light (which nowadays is usually connected with his braking mechanism) at night-time. (See *Davidson v. Cape Town City Council*, 1965 (2) S.A. 559 (C), and see also, *ante*, p. 436; *Carnarvon Bus Service v. Haile*, 1930 P.H., J. 19 (C); *George Wimpey & Co., Ltd. v. Le Roux*, 1957 (1) P.H., O. 6 (C)). But the driver of the vehicle behind will not be able to recover his full damages unless he can show that he was not travelling too fast, or too near, the vehicle ahead of him to be able to pull up in time (*ibid.*) and that he was himself faced with a sudden emergency. (For a full discussion of this subject see *post*, p. 456.)

(d) INTENTION TO TURN RIGHT-ABOUT

A driver is under a duty to display the greatest care in making a right-about turn in a public street, and should not undertake to perform this manoeuvre unless he has made quite certain that no other vehicle either

approaching him or following close behind him will be interfered with by such manoeuvre. (*Bush v. Milne*, 1930 P.H., J. 6 (N)). Per Tatham J.:

'It is the duty of the driver of a motor vehicle to display the greatest care in making a right-about turn in a public street especially at such a busy place as that at which the accident occurred. It is not sufficient for a car driver to look back, and, believing that no traffic is following him to travel another 20 or 25 yards at a slow pace, throw out his hand for a second and, without again looking back, to turn his car so as to bring it across the path of the vehicle following him.'

In other words he is entitled to make such turn only at an opportune moment and after he has satisfied himself that it is safe to do so (*Bell v. Minister of Economic Affairs*, 1966 (1) S.A. 251 (N) at 356-7; *R. v. Faburichi*, 1958 (3) S.A. 802 (S.R.) at 803; *Woods v. Administrator, Transvaal and another*, 1960 (1) S.A. 311 (T) at 313-14). (See also 'U'-Turns (*post*, p. 447.))

Where a defendant, on desiring to turn back the way he had come, had hesitated after making a right-angled turn and then suddenly proceeded forward into the line of traffic, colliding with the plaintiff, who was proceeding therein, the Court ruled that he was guilty of negligence, since he should not have entered the line of traffic at an inopportune moment (*Folscher v. Taljaard*, 1940 P.H., O. 9 (C)).

A motorist turning to his right across a stream of fast-moving traffic coming from the opposite direction is not entitled to turn his car in front of the line of oncoming traffic unless and until he is satisfied that there is an **ample margin** between himself and the foremost oncoming car, to allow him to cross in complete safety; nor is he entitled to assume that the driver of the oncoming car (*ex hypothesi* still so far off that it is possible to turn in front of it with safety) will see his outstretched arm, as would the driver of a car following behind, or to assume that, if necessary, the driver of this oncoming car will slacken speed so as to allow him to pass across his line of travel (*R. v. Court*, 1945 T.P.D. 133, applying *Pierce v. Hau Mon*, 1944 A.D. 175, and distinguishing *Milton v. Vacuum Oil Co.*, 1932 A.D. 197), and it is therefore not sufficient merely to signal, but he must also wait for an **opportune moment** to turn and then must do so in a reasonable manner (*ibid.*, at 138). See, also, *R. v. Nell*, 1943 E.D.L. 101, and *R. v. Kennedy*, 1965 R.L.R. 520 (A.D.).

(e) DUTY OF FOLLOWING DRIVER

While the driver of a vehicle, which is following another ahead within a reasonable distance, has a right to receive timely intimation from the leading car-driver of his intention to stop, or slow down, or change direction, a reciprocal duty devolves upon him, when following behind a vehicle ahead of him, to pay due regard to the signals or indications of the driver thereof to turn to his right, before overtaking the latter. His failure to see the signal or to react appropriately thereto by slowing down or altering his direction can, in appropriate circumstances be castigated as negligence (cf. *Keuning N.O. v. London and Scottish Ass. Corporation, Ltd.*, 1963 (3) S.A. 609 (N); *Makasi v. Barnard*, 1942 (1) P.H., O. 1 (C); *Premier Milling Co., Ltd. v. Bezuidenhout*, 1954 (4) S.A. 625 (T)).

Intention to overtake another vehicle

Having regard to the general rule that an overtaking driver must pass the vehicle ahead on the latter's right-hand side (save where there are

traffic lanes enabling him to pass on the left) expedience and logic demand that all drivers, who desire to move out of line for the purpose of overtaking a vehicle or passing an obstruction ahead, should first see whether there is any following vehicle which might be inconvenienced or endangered by his manoeuvre and he should also give the latter due warning of his intention to overtake the vehicle ahead of him. The reason is obvious, for the following driver behind him may also be of the same mind, at the same time, to overtake him at the crucial moment, having already accelerated for the purpose (*Brown v. African Guarantee & Indemnity Co., Ltd.*, 1968 (2) P.H., O. 46 (N) (see *post*, p. 447). If he were then to pull out of his line of traffic, without giving adequate warning of his intention so to do, he could collide with an overtaking vehicle coming up from behind. The facts in *Bloch v. S.A.R.*, 1939 N.P.D. 106, are illustrative of this rule:

In this case the appellant in a motor-car was following another motor-car and knew that a railway bus was following him. The leading car pulled up when appellant and the bus were travelling about 30–35 m.p.h., the bus being 60 feet behind the appellant. As the leading car drew up appellant slackened his speed to about 10–15 m.p.h., keeping to his side of the road, and when the bus was 30 feet behind him he pulled to his right in order to overtake the stationary car. Thinking that appellant's car was going to stop the bus-driver, who intended overtaking the two cars, proceeded and ran into the rear of appellant's car. In this case the Court held that, as the appellant had failed to signal his intention to pass the vehicle ahead of him, he had been guilty of contributory negligence.

Legislation

In order to prevent the users of the road from being misled as to the driver's intentions, it is now made a criminal offence for a driver to drive with his elbow protruding beyond the window-frame of his car or with his arm raised and the hand or fingers grasping or touching any external portion of the car (i.e. the 'gorilla' driver) (section 119(1)(i) of the Ordinances).

In regard to the observance of the 'No-Overtaking' sign, it has been held that a disobedience thereof is not of the slightest importance where a following driver overtakes one ahead of him but, in so doing, still remains on his correct side of the road (*R. v. Dave*, 1964 (2) S.A. 428 (T)). In this case the sentence was, on appeal, altered to one of a caution and discharge.

(f) ANTICIPATING SIGNALS

While there is an obligation on the driver ahead to give timeous warning of his intention to turn, on the one hand, it is also an obligation on the part of drivers of following traffic to keep a good look-out for such signals to turn (*Keuning N.O. v. London & Scottish Insurance Co., Ltd.*, 1963 (3) S.A. 609 at 613). Where, therefore, the plaintiff, in seeking to pass defendant's car, had collided with the latter because, although the defendant had signalled, the plaintiff was travelling too fast and/or was not keeping a proper look-out, the Court held he was also to blame for the accident (*Hobbs v. Guthrie*, 1938 C.P.D. 410).

When A turned in front of an overtaking vehicle driven by B, without looking, and when B failed to see A's clearly shown intention to turn and had continued to overtake A, the Court held that both drivers had been

negligent and that neither could recover from the other (*Premier Milling Co., Ltd. v. Bezuidenhout*, 1954 (4) S.A. 625 (T)). (Today the court must apportion damages.)

(g) DUTY TO APPROACHING OR ONCOMING VEHICLES

While the turning driver is entitled to proceed with his manoeuvre once he has given an appropriate and timeous signal and has slowed down, or stopped, to enable him to complete his turn (see *Keuning's* case and *Premier Milling* case (*supra*)), it has now been ruled by the Appellate Division that there is, in fact, no obligation upon the **oncoming driver** either to stop or slow down upon observing the signal to turn given by the driver ahead of him, since he is entitled to assume that the turning driver will not turn to his right save at an **opportune moment** and in a **reasonable manner** (*Sieborger v. S.A.R. & H.*, 1961 (1) S.A. 498 (A.D.) at 504-5). Per Van Winsen A.J.A.:

'To return to the enquiry as to whether, if Du Preez (the following driver) had seen the signal, any action at that stage was required of him, the answer seems to be "none than to continue to keep a look-out". There is no obligation upon him to stop or even slow down because of having seen the signal. In parentheses it need scarcely be remarked, that Du Preez's statement in evidence that had he seen the appellants' signal he would have stopped, even supposing it to be true, it cannot burden him with an obligation not imposed by law. The heavy flow of urban traffic would be seriously interfered with if, on each occasion when a signal is exhibited by a motorist intending to turn across the line of traffic, such traffic were required to come to a stop or slow down. Such signal is, of course, a notification to following and oncoming traffic that the driver intends to turn across the line of traffic at an opportune moment and in a reasonable manner. It is, more particularly, a signal to the following traffic that the driver in question **intends** to move over towards the middle of the road preparatory to choosing the opportune moment to cross over on to that half of the road being used by traffic coming in the opposite direction. A driver of a vehicle in this latter direction does not, with reference to a vehicle whose driver has signalled an intention to turn across his path and who is directing his vehicle towards the middle of the road preparatory to doing so, incur an obligation to slow down. Certainly he must keep such vehicle **under observation** and as soon as it is clear that, despite the inopportunities of the moment, it intends to cross in front of him, he must take **all reasonable** steps that may be necessary to avoid **colliding** with it.'

Consequently a driver who is proposing to turn to his right is only entitled to assume that his signal has been observed if special circumstances warrant that assumption, e.g. where an oncoming motorist slows up ostensibly to allow the turn to proceed (*Harvey v. Brown*, 1965 (3) S.A. 746 (E)). See also *R. v. Miller*, 1957 (3) S.A. 44 (T).

3. TURNING

(a) *Turning right*

The precautions to be taken by a driver who intends turning to his right have been dealt with *supra*, p. 436, the essence of the duty, besides signalling, being to keep a keen look-out for both oncoming and following traffic and also for other drivers who have indicated their intention to turn in the intersection or street concerned (*Verwey v. Malherbe*, 1959 (1) S.A. 884 (C)). In this case it was ruled that the test of negligence depends upon an answer to all three of the following questions: (a) was ample warning

given of the intention to turn? (b) was the manoeuvre executed at an opportune moment and in a reasonable manner? and (c) could the motorist reasonably assume that both oncoming and the following traffic have observed his signal? See also *Sampson v. Pim*, 1918 A.D. 657; *Barendse v. Smith*, 1923 E.D.L.; *R. v. Court*, 1945 T.P.D. 133; *Pretorius v. African Gate and Fence Works*, 1939 A.D. 569; *Premier Milling Co., Ltd. v. Bezuidenhout*, 1954 (4) S.A. 625 (T). For the rule nowadays, in regard to question (c), see *ante*, p. 438.

(b) *Turning left*

The act of turning left, although not as dangerous a manoeuvre as turning right, is nevertheless an act which must be undertaken with due regard to the presence of other users of the road and should not be done at a time and manner which might place the drivers of following vehicles in positions of danger (*Reemers v. A.A. Mutual Insurance Association, Ltd.*, 1962 (3) S.A. 823 (W) at 825). The obvious precaution, before making the turn is to select the extreme left-hand side of the road and to give the appropriate signal. In this regard it should be noted that a failure to steer his vehicle to his extreme left-hand side, before making his turn, is now a statutory offence (section 113(1) of the Ordinances). Since this provision now applies to all public roads, whether urban or rural, the decision in *R. v. Kangaroo*, 1941 N.P.D. 16, is no longer of application.

The signal to turn to the left must be timely in order to allow other drivers to adjust their speed and direction accordingly (*Lotter v. Alliance Assurance Co., Ltd.*, 1953 (2) S.A. 786 (G.W.), and *Milton v. Vacuum Oil Co.*, 1932 A.D. 197). Consequently where a driver, immediately after passing another ahead of him, puts out his hand and immediately turns to his left, he has only himself to blame for the subsequent collision (*R. v. Reynolds*, 1930 E.D.L. 246). Once the turn is complete, the duty to look out for following traffic ceases (*R. v. Clarke*, 1932 (2) P.H., O. 23 (T)), but he would still have to pay due regard to the drivers in the street into which he has turned (section 113(1) of the Ordinances).

In *Pretorius's* case (*supra*) the lorry was taking a right-hand turn across the path of a motor-cyclist (the plaintiff) who was approaching at a speed of about 20 m.p.h. The mechanical signal of the lorry was out and it turned at about 5 m.p.h. The driver first saw the plaintiff when he struck the right front bumper of the lorry. Plaintiff only became aware that the lorry was crossing his path when he was some 30 feet from it. He applied his brakes and swerved to his left, but failed to avoid the lorry which had, in the meantime travelled some 12 to 13 feet. Held, that the plaintiff's negligence ceased at a critical stage some 1½ seconds prior to the collision, that the continuous negligence of the lorry-driver in failing to see the cyclist and his consequent failure to apply his brakes and thus avoid the collision, was the proximate cause of the accident and that therefore the defendant was liable.

See also *De Villiers v. Peiser*, 1930 C.P.D. 361; *R. v. Pretorius*, 1943 C.P.D. 290, and *R. v. Rahman*, 1950 (2) S.A. 44 (N); *R. v. Cronhelm*, 1932 T.P.D. 86; *Lotter v. Alliance Ass. Co.*, 1953 (2) S.A. 786 (G.W.); *Martindale v. Wolfaardt*, 1940 A.D. at 242.

As to when the driver should turn, much depends on the speed and distance away of the other car. His action must not be viewed in the light of subsequent events or by the fact that he may not have realized the apparent carelessness of the other driver until danger was imminent (*Heyns v. Jordaan*,

1943 (1) P.H., O. 15 (O)). The negligence of the turning driver will not always enable the following driver to recover his full damages, as where the latter fails to see the obvious intention of the defendant to make a turn (*Premier Milling Co. v. Bezuidenhout*, 1954 (4) S.A. 625 (T)).

On the other hand, where the signal is difficult to see because of the dark background, the overtaking driver may not be faulted for his failure to see it (*De Beer v. Todd N.O.*, 1955 (1) S.A. 639 (S.R.)).

Speed when turning

The speed when turning must depend on the circumstances. Obviously it should not be too fast. On the other hand a driver may be faulted for turning at too slow a speed (*Minister of Defence v. Clegg*, 1946 (2) P.H., O. 3 (C)). In *Pretorius's* case (*supra*) the accused travelled so slowly in making his turn that he probably misled the approaching cyclist into thinking that he was going to stop to allow the cyclist to cross in front of him.

(c) SIGNALLING AT ROUNDABOUT

It is not necessary for a driver, when travelling around a traffic circle or island, to give a signal that he is turning right (provided he is in the correct lane) when there is a street leading out of the circle to the right (*S. v. Kruger*, 1967 (3) S.A. 496 (C)). There would however, be a duty upon him to signal if he desires to turn left out of the circle (*ibid.*, at 497).

(d) LOOK-OUT

While there is a grave duty upon the driver to keep a proper look-out before entering a main road (*De Beer v. Todd N.O.*, 1955 (1) S.A. 639 (S.R.)), a driver in the latter thoroughfare is also under some duty to take proper notice of a driver approaching a main road in a farm road in the event of the latter possibly making a turn in the road ahead of him (*Van Zyl v. Gracie*, 1964 (2) S.A. 434 (T)), and his failure in this regard can sometimes result in an apportionment of damages (*ibid.*).

The look-out must reasonably **proximate to the time of turning** and not be at some time anterior to it (*R. v. Cronhelm*, 1932 T.P.D. 86).

In this case the accused, when about 100 yards from the side street into which he intended turning on his right, looked into his windscreen mirror and saw that no traffic was then following him. Thereafter he took no further precautions than to slow down to a speed of 10 to 15 m.p.h. and to signal his intention of turning by putting out his hand. In turning he collided with a motor-cyclist who was overtaking him from the rear and who had been concealed by a bend in the road when the accused had looked into his mirror. Held, that the accused had not discharged his duty merely by looking in his mirror when 100 yards from the scene of the accident; it was his duty to see that the way was clear and he owed this duty to the traffic following him in the main street as well as to oncoming traffic.

Nor should the party seeking to turn intrude into the line of an oncoming vehicle in such a manner as to give the driver of the latter vehicle only a second or so to swerve in order to avoid him (*R. v. Kennedy*, 1965 R.L.R. 520 (A.D.) at 525). See, also, *Johannesburg C.C. v. P.U.T.C.O.*, 1963 (3) S.A. 157 (W) at 161, and *R. v. Miller*, 1957 (3) S.A. 44 (T).

Cronhelm's case (*supra*) is to be contrasted with the decision in *Pavend v. De Bruyn*, 1937 (2) P.H., O. 22 (N).

The facts in this case were that respondent was travelling along the street where he lived and was about to turn to his right in order to enter his gate. Shortly before doing so he hooted and looked into his mirror, and, seeing no one approaching, gave a signal four or five paces before he actually commenced the right-hand turn. Appellant's car was then at least 120 feet away travelling in the same direction as the respondent who was then travelling about 5 m.p.h. while the speed of appellant was about 23 m.p.h. When respondent had nearly completed his turn and was nearly at the edge of the macadam on the right of the road he suddenly saw appellant's car about 9 yards away and, though he turned his car to the left, a collision resulted. Here Hathorn J. held that there could not possibly have been an accident unless appellant had driven negligently and dismissed the appeal.

See, also, *R. v. Court*, 1945 T.P.D. 133 at 134; *Sieborger v. S.A.R. & H.*, 1961 (1) S.A. 498 (A.D.) at 505, and see also *R. v. Miller*, 1957 (3) S.A. 44 (T).

For a decision on the duty of a driver to look into his **rear mirror** before changing his course see *Bloch v. S.A.R. & H.*, 1939 N.P.D. 106, P.H., O. 29.

Mere omission to see an overtaking cyclist is not per se negligence in the absence of evidence showing that the cyclist's position on the road, in relation to the turning car when the driver looked into his mirror, was such that he should have been observed (*R. v. Van der Merwe*, 1940 E.D.L. 37). But the mirror is not the only means of ascertaining the presence of people and vehicles behind. Nevertheless, it is incumbent on the prosecution to produce facts showing that the person with whom the accused collided **ought to have been seen** by him, if a failure to keep a proper look-out is an element of the offence charged. This was done in the case of *R. v. Ackerman*, 1939 P.H., O. 61 (C). Here the accused had signalled and turned to his right after glancing in his mirror, but the Court of Appeal agreed with the magistrate that the accused looked so carelessly that he failed to see the vehicle a few feet behind him. See also *De Villiers v. Peiser*, 1930 C.P.D. 361. In this connection it should be remembered that frequently the following (overtaking) driver is so near to the driver's rear right as not to be observable by means of the mirror alone.

Turning at traffic lights: The duty to look behind one does not apply where the driver reached a **robot** at the **intersection of two important streets**. If he is in the line nearest the middle of the street he has fulfilled the whole of his duty to the traffic behind him if he gives the proper signal at a reasonable place and for a reasonable time; the reason being that, at robots, turns by traffic ahead of one are to be expected and anticipated (*R. v. Hattingh*, 1935 N.P.D. 336). Per Hathorn J.:

'In *R. v. Fratees*, 1932 C.P.D. 308, Watermeyer J. said: "He says he put out his hand 20 to 30 yards before turning and slowed down in order to turn. When he had done that then I think he is entitled to assume that the traffic, which he knows is coming behind him, has kept a proper look-out and has seen his signal, and then he has to keep his mind fixed upon the traffic coming towards him from the other side, because that traffic may want to turn one way or the other, and he has to keep a good look-out to see when he can go safely across the line of traffic. I think it is expecting too much of him to look both forward and at the same time keep on looking back to see what the traffic behind him is doing. I think he is entitled, when he has given a reasonable signal that he is going to turn, to assume that traffic behind him has seen the signal." I agree with that statement subject to the qualification that it should apply when the person giving the signal is in a position on the street proper to a person about to take a right-hand turn. In my judgment a motorist who is in a

street which takes **two or more lines of traffic** travelling in the same direction and who intends to take a **right-hand turn**, should be in that line which is in the **middle** of the street.'

For another case of negligent turning at a robot see *African Tobacco Manufacturers (Pty.) Ltd. v. Inglis*, 1935 N.P.D. 66, where it was ruled that although a driver is entitled to take the right-hand turn, there is a special duty upon him to take special care in turning in front of **oncoming traffic**; there is, furthermore, also a duty upon drivers in that oncoming stream to apprehend, and be prepared for, the signal of that driver to make his turn. See also *Durban Corporation v. Raghoo*, 1938 N.P.D. 506. In this case a bus-driver commenced turning round a robot which was showing green in his direction, at a time when defendant's tram was some 70 yards away. The tram-driver ignored the signal and, by proceeding, collided with the bus. Held, that the bus-driver was entitled to damages.

There is, however, no obligation upon the driver making a turn to rivet his attention on the oncoming car. His duty is to be aware of the approaching vehicle and to see that it does not prove a danger (*Minister of Defence v. Clegg*, 1946 (2) P.H., O. 31 (O)).

In *R. v. Harrison*, 1927 E.D.L. 262, it was held that the driver of a bus travelling at 35 m.p.h. had rightly been convicted of negligent driving for colliding with a wagon which had turned right across the line of his travel when he was 50 yards off.

After giving a signal of one's intention to perform a turn in one direction it may, in certain circumstances, be gross negligence to **turn in the opposite direction** (*R. v. Motiki*, 1929 C.P.D. (J/C 133/29)), for a signal given implies that a driver intends to carry out what is represented by that signal in terms of the rules of the road (*Tomlinson v. Cawse*, 1926 E.D.L. 9). In *Motiki's* case, the accused was driving a motor-car along a public road and gave a signal that he was going to turn to his right. Before turning, however, he swung to his left, and appellant, who was following him, narrowly escaped a collision. Held, that he was rightly convicted. See, also, *R. v. Trussler*, 1935 P.H., O. 6 (N), for the converse manoeuvre. In this case a lorry-driver, in order to take a **left-hand** turn, put out his left hand and eased over to the right in order to take the sharp bend to the left. The appellant had, at the moment, decided to pass the lorry-driver, and this unexpected manoeuvre put him into a difficulty. He then turned left and hoped to pass the lorry on its left, but collided with its front mudguard. Held, that although the driver of the lorry was negligent, the appellant had also been in a certain measure blameworthy, and the appeal was dismissed accordingly. Today damages would be apportioned.

As to the rights and duties of a **pedestrian** at a robot-controlled crossing see *Pincus v. Solomon*, 1942 W.L.D. 243, where it was held by Greenberg J.P., that, notwithstanding the fact that the law gives the right of way to pedestrians over vehicles (including those making turns), the pedestrian should still keep a reasonable **look-out**, and in this case only had himself to blame for walking into the rear portion of the defendant's car (see *ante*, p. 375).

Finally, in giving a signal one must do so in circumstances where it is clearly **observable** by the traffic sought to be warned (*Hobbs v. Guthrie*, 1938 C.P.D. 410). *Bell v. Minister of Economic Affairs*, 1966 (1) S.A. 251 (N)).

Where, therefore, the accused in seeking to emerge from a line of cars parked on either side of him into the line of traffic running between two lines of parked cars, put out his hand and moved out, the Court held that he had not fulfilled the whole of his duty, since the traffic coming up behind him had not been in a position to see his signal (*R. v. Fig*, 1933 P.H., O. 7 (C)).

(e) TRAFFIC LANES

In certain cities the roads, being wide enough to accommodate three lines of traffic, have been divided into traffic lanes. In such cases the various provincial Ordinances have provided that a person seeking to turn left should move over into the left-hand lane and that the person seeking to turn right should move over to the immediate left of the middle of the roadway (section 113(2)(a)).

In moving from one traffic lane to another he may do so only when he does not obstruct or endanger other traffic (section 110).

(f) 'U'-TURNS

The practice of making 'U-turns' in intersections was at one time reprobated by statute, either under local statute or by Ordinance (see section 87(4) of Ord. No. 17 of 1956 (O)) but, no doubt influenced by the decision in *Eagle Star Insurance Co., Ltd. v. Sklar*, 1959 (2) P.H., O. 19 (A.D.), the present ordinances are silent in this particular regard. In *Sklar's* case it was ruled that such an act in contravention of a prohibitive 'no U-turn' sign, was not necessarily negligence in the absence of other factors of *culpa*. The real test is whether or not the driver had first made sure that he could make the said manoeuvre with safety to himself and other persons on the roadway (*Naidoo v. Durban Corporation*, 1961 (2) S.A. 775 (N) at 778; *Keuning N.O. v. London & Scottish Insurance Co., Ltd.*, 1963 (3) S.A. 609 (D); *Bell v. Minister of Economic Affairs*, 1966 (1) S.A. 251 (N)) (see also *ante*, p. 349). Such turns may, and should, be made **between** intersections when both approaching and overtaking traffic permit of such manoeuvre being made with safety.

4. PASSING OTHER VEHICLES

An examination of the driver's obligations and rights when passing other vehicles on the road evolves itself into a study of his position (a) when overtaking vehicles from behind; (b) passing stationary vehicles, and (c) passing vehicles coming towards him.

(a) WHEN OVERTAKING VEHICLES

The careful driver, when seeking to pass vehicles ahead of him and which are proceeding in the same direction, bears in mind that he must (i) see that the road is clear for him to do so; (ii) hoot to let the vehicle and persons ahead know what he is doing; (iii) never pass on a blind corner or over the crest of a hill; (iv) usually pass that vehicle on the right; (v) allow sufficient space for lateral movement on the part of that vehicle; (vi) not to 'cut in'; (vii) anticipate signals to turn, and (viii) notify traffic behind of his intentions. (See also *ante*, p. 438.)

(i) *To see that the road is clear*

The legal duty on the part of the driver of a vehicle, in seeking to overtake another ahead of him is to see that the road is clear of pedestrians or other traffic coming towards him so that he can perform the manoeuvre with safety to himself and others (*Fallon's Estate v. Claret*, 1932 A.D. 177, and *Wagenaar v. Thomas*, 1930 W.L.D. 81; *R. v. Abrahamson*, 1940 P.H., O. 28 (C); *R. v. Sullivan*, 1942 C.P.D. 123), and his failure to do so may also be a criminal offence (section 109 of the Ordinances). In these cases the defendant found, on passing a car ahead, that there was a pedestrian crossing the street and it was then too late to avoid a collision, while in *R. v. Ekermans*, 1935 C.P.D. 32, he did not see him at all. See also *Kruger v. Van der Merwe*, 1966 (2) S.A. 266 (A.D.). Nor is it necessary that there should be an actual collision, for it is sufficient that damage was caused by reckless conduct on the part of the driver of the overtaking car in this respect (*Gain's Golden Bakeries v. Gouws*, 1929 T.P.D. 137). In this case the defendant, in a van, attempted to pass a vehicle in front of it proceeding in the same direction. The plaintiff, travelling in the opposite direction to the van, which was then on its wrong side of the road, was forced on to some loose sand on the side of the road where his cycle skidded and he crashed into a wall. Held, he was entitled to damages. For an instance where the driver went on the wrong side of the road in order to pass the vehicle ahead and collided with oncoming traffic, see *R. v. Keevy*, 1928 E.D.L. 180. Here, Graham J.P. said:

'It is the duty of the driver of a motor-car, before he passes a vehicle proceeding in the same direction as he is, to assure himself that the road is clear of oncoming traffic.'

It follows that to attempt to pass another vehicle ahead when visibility is obscured by a cloud of dust made by it, is highly negligent (*Wilson v. Mackay and another*, 1962 (3) S.A. 291 (F.S.C.)).

Moreover, the act of overtaking a leading vehicle in disregard of the fact that the driver has indicated, by a timeous and adequate signal his intention that he is about to turn, can be negligence (*Keuning N.O. v. London & Scottish Assurance Co.*, 1963 (3) S.A. 609 (N) at 613).

(ii) *Hooting*

In general, when a motorist seeks to overtake another it is his duty to give due warning of his intention to pass (*R. v. Cox*, 1929 C.P.D. 153). Per Lansdown J. in *R. v. Freeman*, 1931 N.P.D. 460:

'... when passing another vehicle going in the same direction he should sound his hooter, so that the driver thereof and pedestrians and drivers of vehicles who may, by the car proposed to be passed, be shut out of his vision, be warned of his approach.'

There is no need to hoot, however, if the person concerned, e.g. a cyclist, is aware of his approach (*Viljoen v. S.A.N.T.A.M.*, 1954 (2) P.H., O. 12 (O); *Whatley v. Dixie*, 1927 E.D.L. 203, and *Bloch v. S.A.R. & H.*, 1939 N.P.D. 106).

Whether a driver should be obliged to hoot before overtaking another vehicle depends upon the circumstances of each case (*Tonyela v. S.A.R. & H.*, 1960 (2) S.A. 68 (C) at 70). Generally speaking, a passing motorist

is entitled to assume that the slower vehicle being overtaken will continue on its course on the left of the road (*Mabaso v. Marine & Trade Insurance Co., Ltd. and another*, 1963 (3) S.A. 439 (D)), and when there is no reasonable possibility that the driver ahead may stray from his proper course (*ibid.*). In this case however, it is submitted that James J. went too far in limiting the overtaking driver's duty to hoot only if there is a 'manifest intention' on the part of the driver ahead to stray from his course and this part of his decision was criticized by the author in (1964) *S.A.L.J.* at 304, since there may be some vehicle (or pedestrian), or obstacle, or hole in the road ahead of the driver sought to be overtaken, which the overtaking driver cannot see, and which would necessitate a sudden alteration of his course to the right, so that when an emergency does arise it would be too late for the overtaking driver to avoid a collision. The position would be otherwise if the overtaking driver has a clear view of the road ahead of the vehicle sought to be overtaken and when the necessity to hoot would obviously not arise. (See also *Morrall v. Stofberg*, 1946 C.P.D. 298.) Certainly the duty to hoot would arise on the part of a traffic-officer who seeks to overtake a line of slow-moving traffic in order to ascertain the cause of a blockage (*Davidson v. Cape Town City Council*, 1965 (2) S.A. 559 at 565), or where there are observable pools of water ahead which might cause the driver ahead to swerve (*Pauley v. Marine Trade & Insurance Co.*, 1964 (3) S.A. 370 (W) at 376).

An example of the overtaking driver being found culpable for endeavouring to overtake a vehicle ahead, without first giving any warning of his intention to do so, is to be found in *Brown v. African Guarantee and Indemnity Co., Ltd. and another*, 1968 (2) P.H., O. 46 (N). In this case the passenger in the car ahead was awarded damages against both his own driver (for moving to his right without looking into his rear mirror) and the second defendant (for attempting to pass without warning the passenger's driver of such intention to pass).

Once the warning of intention to pass is given there is no specific duty upon the overtaking driver to satisfy himself that the driver ahead has **heard** the warning hoot to pass (*Beswick v. Crews*, 1965 (2) S.A. 690 (A.D.)). This decision is more in conformity with the realities of present day motoring activities and, it is submitted, tacitly overrules the decision in *Lakier v. Van der Spuy*, 1945 (1) P.H., J. 8 (W).

(iii) *Passing on blind corner or crest of hill*

The provincial Ordinances (see sections 109(4) (T) and 109(2) (N)) provide that no driver shall pass or attempt to pass another car at a bend, corner or turning or on the crest of a grade, until he has a clear view of approaching traffic and is satisfied that the road is sufficiently clear to permit of his so doing. This is only common sense, and it is therefore submitted that where an accident occurs owing to the driver of a vehicle not having observed this elementary precaution, he will be *prima facie* guilty of negligence since the object of these rules is to minimize the chance of accidents (*Harmsworth v. Smith*, 1928 N.P.D. 174). See *Mayers v. Lemonsky*, 1924 C.P.D. 425, and *Morley v. Wicks*, 1925 W.L.D. at 21. In *R. v. Mahametsa*, 1941 A.D. at 86, this type of carelessness was stigmatized as recklessness or gross negligence.

As to what amounts to a crest of a hill, see *S. v. Santos*, 1962 (1) S.A. 369 (N) (*ante*, p. 381).

(iv) *Passing on right-hand side*

The general rule is that slower-moving traffic should travel as near as possible to the left-hand side of the road, and for faster-moving traffic to pass on the right. The slower-moving driver should move over more to his left when he becomes aware that a following driver desires to overtake him. The obligation of the overtaking vehicle driver to pass on the right is however subject to two limitations namely (a) where the vehicle being overtaken is turning to its right and (b) in an urban area where the street is wide enough for two lines of traffic (see section 109 of the Ordinances, and *R. v. Stein*, 1940 N.P.D. 413).

The rule in regard to passing on the right is based on convenience and common sense, but a failure to subscribe thereto does not in itself constitute proof of negligent driving (*R. v. Press*, 1938 C.P.D. 356; *R. v. Frans Radebe*, 1945 O.P.D. (J/C 122/45), for as was said by Clyde L.P. in *Christie v. Glasgow Corporation*, 1927 S.C. 276:

'The rules of the road are not rules of law at all, but of common sense, and whether a departure from them is culpable depends on the circumstances in which the departure is made.'

Where, however, a collision has occurred as a direct result of a failure to pass on the right, a driver can be held legally blameworthy (*R. v. Trussler*, 1935 (1) P.H., O. 6 (N)).

It is submitted that, in rural areas, much would depend upon the circumstances of each particular case as to whether fault would be found in the driver who passes the driver of a vehicle ahead of him on the latter's left-hand side. Thus where the driver ahead obstinately or maliciously refuses to heed repeated requests (by hooting) to move over more to his left in order to enable the driver behind him to pass on his right, the driver behind him should be entitled to pass him on his left. But, before taking this course, he must first satisfy himself that (a) the road ahead is broad enough for the purpose, (b) that there are no obstructions ahead of him, (c) there are no side roads or entrances to dwellings into which the driver ahead may be turning to his left and (d) no other vehicles or persons or animals are likely to be endangered by such manoeuvre. He may also (as indicated above) pass on the left of the vehicle ahead where the driver has clearly indicated his intention to turn to his right and provided there is sufficient room for the purpose. (See section 109(1)(b)(ii) of the Ordinances).

Drivers of slow-moving vehicles should, on their part, anticipate that faster-moving vehicles behind them may wish to pass, and should keep a good look-out for them. Upon being requested to move over to their left-hand side of the road in order to enable the following vehicle to pass, they should do so, otherwise they may incur the statutory penalty of driving without reasonable consideration for other road-users (sections 139 and 130, and see 'road hogging', *post*, p. 455). Certainly they should not, at an inopportune moment and without adequate warning, swerve over to their right (*Pauley v. Marine Trade Insurance Co., Ltd.*, 1964 (3) S.A. 657 (W); *Beswick v. Crews*, 1965 (2) S.A. 690 (A.D.)).

In this regard it has been held that it is not negligence for the driver behind to get very close to the vehicle ahead before swerving out to pass it unless there be an obstruction or danger to other traffic (*R. v. Mtembu*, 1956 (4) S.A. 334 (T) at 336). Nor is it negligence, per se, to cross over the solid line in order to pass if no other vehicle is endangered (*ibid.*).

(v) *Allowing for lateral movement of cyclist and horses*

The reasonably careful driver will allow a **sufficient berth**, or space, between his car and the vehicle sought to be passed, so as to provide for any unforeseen lateral movement on the part of the latter which might result in a collision (*R. v. Greaves*, 1935 E.D.L. (J/C 569/35); *Beswick v. Crews*, 1965 (2) S.A. 690 (A.D.)). Consequently, where a motorist, upon overtaking a cyclist, allowed only 18 inches between the cyclist and himself, and a collision resulted, he was regarded as having rightly been convicted of negligence (*R. v. Geldenhuys*, 1940 P.H., O. 7 (C)). In *Greaves's* case the driver was overtaking a cyclist, who suddenly deviated and was injured. Per Gane J.:

'It appears, however, that a driver of a vehicle in a street may reasonably be required to be prepared for persons, who are travelling in front of him, diverging to some extent from the strict left-hand side of the road. In the old case of *Mayhew v. Boyce*, 1 Stark 423, two coaches were driving in the same direction. The driver of the front coach, coming to the conclusion that he was driving rather too near the edge of the road, turned out more towards the centre, and in the act of so doing, he was run into by the driver of another coach from behind. It was held that the driver was not obliged strictly to hug the left-hand side of the road all the time, and that a person who was driving behind him must anticipate his possibly diverging from the left-hand side to a reasonable extent. In that case the driver of the rear vehicle was held liable. The magistrate says too that, in the case of a *pedal cycle* specially, the driver of a road vehicle must expect a certain amount of lateral movement on the part of a cycle, and on that point I refer to a case decided in this Court in 1929, *R. v. Cox*, 1929 C.P.D. 153. In that case my brother the acting Judge-President used the following language: "It is common knowledge that a bicycle is a vehicle which does not always travel in a mathematically straight line; it swerves about the road, and a motorist overtaking a bicycle ought, I think, to anticipate that the bicycle will not necessarily keep straight, but may swerve across the front of the oncoming motor-car, unless the cyclist knows there is traffic behind him."'

The last sentence is of importance. Where, therefore, a **cyclist**, on being overtaken by a motorist, swerved to his left and then, as the accused drew near, suddenly swerved to his right in order to enter a track on the right-hand side of the road, the Court held that the pertinent question to be decided was whether the accused was entitled to assume that the deceased was aware of the approach at the time of passing (*R. v. Vlok*, 1937 T.P.D. (J/C 2/37)). In this particular case the Court found that the driver was entitled to assume this fact and that he should not, therefore, have been convicted of negligent driving. See also *R. v. Van der Walt*, 1937 T.P.D. (J/C 110/37). In both these cases the cyclist, after turning one way after hearing the approaching car, foolishly and suddenly swerved at the last moment into the way of the car. See also *R. v. Marais*, 1940 P.H., O. 29 (T), where the cyclist, after hearing the hooter and slowing down, suddenly accelerated. Held, that under the circumstances the driver had not been culpable. It seems reasonable to postulate, therefore, where no indication has been given by the cyclist that he has heard one's hoot, he is, in fact,

unaware of the approach of the overtaking vehicle (*Whatley v. Dixie*, 1927 E.D.L. 203). In *Beswick v. Crews* (*supra*) the driver of a lorry had swerved to avoid a brick on the road and a female motorist had endeavoured to pass him when allowing a distance of only 2 feet between her and his vehicle and here it was ruled that she also had been negligent. See, also, *Pauley v. Marine Trade Insurance Co.*, 1964 (3) S.A. 275 (W).

The fact that a child cyclist has swerved over to his right-hand side of a rough road, after the driver had hooted, is no invitation to the latter to pass on his left (*R. v. Press*, 1938 C.P.D. 356). In this case the child, at the last moment, swerved back to his left. Held, that the appeal, against the conviction of the driver, should be dismissed.

For a decision, where liability for *culpa* was found in the action of a driver in swerving to avoid a horse, encountered on a roadway at night-time, without ensuring that he could do so safely and without colliding with an overtaking ambulance, see *Brown v. African Guarantee & Indemnity Co., Ltd.*, 1968 (2) P.H., O. 46 (N). Here the passenger was awarded damages against both the drivers involved in the collision.

(vi) *Cutting-in*

Having passed a vehicle on its right the driver should not again drive to his left-hand side of the roadway until he is safely clear of the vehicle (section 109 of the Ordinances).

It not infrequently happens that the driver of the overtaking vehicle either fails to see that the road ahead is clear, or deliberately takes an unnecessary risk in seeking to pass a vehicle ahead of him when he is confronted with another vehicle proceeding in the opposite direction. In such cases, in the emergency of his own creation, he then usually endeavours to swerve back on to the road on his left, thereby cutting into the way of the vehicle which he has barely passed, and forcing the driver of that vehicle to swerve to his left or leave the road in order to avoid a collision. In such a case the driver of the overtaking vehicle is guilty of gross negligence (*R. v. Dilley*, 1935 C.P.D. (J/C 615/35)). In this case the accused had tried to pass two cars travelling abreast when he was met by a car travelling towards him.

The appellant, the driver of a motor-car, tried to pass between a motor-lorry, which he was overtaking, and a mule wagon, which was coming towards him. It appeared that the road was 24 feet wide, and the space between the lorry and the mule wagon, through which he attempted to pass, was 12 feet. Appellant collided with the mule wagon and with another vehicle ahead of the lorry. Held, on appeal, that in 'cutting-in' under these circumstances the appellant was driving recklessly (*R. v. Mahlangu*, 1930 T.P.D. 787). Per Tindall J.:

'Under such circumstances a driver ought not to cut in at all, and, if he does, he ought to be particularly careful. It seems to me that the evidence in this case shows that the accused was not careful, and that he took too great a risk in trying to get through in the circumstances mentioned. It was the accused's duty, if he decided to do such a risky thing, to go slowly and keep his car under perfect control so as to be able to pull up at any time without coming into collision with any other vehicle.'

In this regard it has been decided that to cut in in front of another bus and then to stop immediately thereafter without adequate warning, is also an act of negligence (*Maharaj v. Phillips*, 1955 (2) S.A. 658 (N)).

Cases

Accused saw deceased, a boy of 14 years, about 100 yards away on a bicycle. He hooted; deceased looked back and his hat fell off. Accused slowed down to 35 m.p.h., but collided with the deceased. Held, that the accused ought to have anticipated that the latter would change his course in order to recover his hat, and should have allowed for such sudden erratic movement by the deceased as did in fact occur (*R. v. Mahametzta*, 1941 A.D. 83).

Defendant passed a cyclist and then turned left in front of him, causing the rear end of his lorry to strike the plaintiff's front wheel. Held, that the defendant had been negligent and was liable in damages (*Brick v. Armour*, 1946 P.H., O. 1 (S.R.)).

The accused was approaching two Native cyclists who separated, one to each side of the road, on seeing him approach. As the accused was going through the gap thus made, one cyclist swerved and was killed by the accused. Held, that the accused was not guilty of negligence since the test is not the remote possibility of an accident that must be apprehended, but whether one could be reasonably anticipated (*R. v. Dewar*, 1939 P.H., O. 47 (S.R.)).

In *Whatley v. Dixie*, 1927 E.D.L. 203, it appeared that the appellant's car was overtaking a cyclist who was travelling on the left. Ahead of him three Scotch carts were travelling towards them on their left, and appellant, when about 200 yards away from the cyclist, hooted but did not hoot again. When 50 yards from the leading cart the defendant looked to his right for a moment to see if he had sufficient clearance, and on looking to the front again saw that the deceased had left the gravel on the left and was on the tarred portion of the road in front of him. Thereafter he did all in his power to avert an accident but without success. The Court decided that he was liable in damages.

(b) PASSING STATIONARY VEHICLES

When passing stationary vehicles it would seem that the driver of the vehicle concerned should have regard to two distinct factors, namely, he must first be alive to the possibility that that vehicle may be pulling off into the line of traffic again, and secondly there may be pedestrians alighting from the stationary vehicle and crossing the street. (*New Zealand Insurance Co. v. Karim*, 1963 (4) S.A. 872 (A.D.)). Accordingly when, owing to the narrowness of the street it is necessary to pass close to a stationary omnibus ahead, it is the duty of the overtaking bus-driver to slow down and also to sound his hooter in order to give adequate warning of his approach. He should also satisfy himself that he can pass safely (*Singh v. New India Assurance Co., Ltd.*, 1966 (4) S.A. 154 (D)), for it is common experience that persons alighting from buses do attempt to cross roads in the path of oncoming traffic (*ibid.* at 159).

(i) Vehicle pulling off

While no reasonable man would expect a driver to pull out into the stream of moving traffic without giving an adequate and clear signal of his intention to do so, the drivers of vehicles in the stream of traffic must, on the other hand, be alive to observe these signals and to adjust their speed and direction accordingly (*R. v. J. Wolff*, T.P.D., 26/4/1937 (unreported)). In this case the complainant, who had stopped on his left-hand side of the road, started off again and indicated with his right hand that he was going to move out. The appellant was proceeding in the same direction and should, so the Court found, have seen the lorry slowly moving out and the hand signal of the driver thereof. He was therefore found to have been at fault either in not seeing the signal or in endeavouring to pass when he knew that the lorry was entering the stream of traffic (see also *R. v.*

Sabaan, 1931 E.D.L. 342). The negligence of the driver of the vehicle in the stream of traffic is, however, dependent on the driver of the stationary car giving **an adequate and observable signal**, so where the accused, after moving into a narrow passage between two lines of parked cars, gave a signal that he was moving out, but a signal which was not discernible to the drivers of oncoming traffic, it was held that he was culpably negligent (*R. v. Fig*, 1933 P.H., O. 7 (C)). Nor should the driver anticipate that a person in the stationary vehicle will, without warning, suddenly **open the door** to get out (*Levinovitch v. Cartwright*, 1933 C.P.D. 216).

(ii) *Pedestrians alighting from a bus*

It is a criminal offence to pass or overtake a stationary bus without due care in respect of the safety of pedestrians approaching or moving away from such bus (cf. section 109(3) of Ord. No. 21 of 1966 (T); section 110 of Ord. No. 21 of 1966 (N); section 109(3) of Ord. No. 21 of 1966 (C) and section 109(7) of Ord. No. 21 of 1966 (O)). The reason for the rule is illustrated in *Harmsworth v. Smith*, 1928 N.P.D. 174, where Dove-Wilson J.P. said:

‘But passengers alighting very frequently pass round the end of the car and make for the other side of the street without looking to see, or thinking about, what traffic they may encounter. In doing so they may **act foolishly**, but it is largely if not mainly because people are apt to act foolishly, that such by-laws exist. The object of the by-law is not merely to afford greater facilities for tramway passengers, but to minimize the chance of accident's, a chance which this particular kind of folly is specially calculated to increase, for the passengers and the oncoming vehicle are hidden from each other by the body of the tramcar.’

See, also, *R. v. Abrahamson*, 1940 P.H., O. 28 (C); *Singh v. New India Assurance Co.*, 1966 (4) S.A. 154 (D) at 159, and *R. v. Van der Spuy*, C.P.D., April, 1926 (unreported), in which Gardiner J. is recorded as having said:

‘Apart from any regulation it seems to me that the attitude of the motorist who is about to pass a tramcar that has stopped to set down passengers, even if it commences to move, is to see that no passengers are passing over from that tramcar. . . . What does a man expect when a tramcar stops to set down passengers? One must expect the ordinary carelessness of the public who, having alighted from the car, wish to cross to the other side of the road. They will pass from behind a car — one sees it constantly. Every motorist sees it. When the accused saw the tram stop he must have known that it is quite a common thing and he might have anticipated that someone would get down and proceed from behind it to the other side of the road. He might also have expected that any person getting down and emerging from behind cover of the car would not look towards Cape Town but towards Sea Point. . . . It was the duty of the accused to keep a proper look-out and he had no excuse for not fulfilling that duty.’

It is, therefore, the duty of the driver to drive his vehicle at a reasonably slow speed in order to allow for eventualities of this nature (*Burkhardt v. Elias*, 1911 W.L.D. 199; *R. v. Subel*, 1949 (3) S.A. 212 (N)).

Whether a pedestrian, who is knocked over after alighting from a tramcar, will be able to claim damages notwithstanding his own fault in failing to keep a proper look-out, will depend on the circumstances of the case. In *McLean v. Bell* (1932) 147 L.T.R 262 (H.L.), it was decided that, though the pedestrian had been negligent in this respect, yet the defendant had had an opportunity of avoiding the consequences of her negligence and that

she was therefore entitled to damages. This is also the burden of the decision in *Baratz v. Johannesburg Municipality*, 1913 T.P.D. at 739, but in the case of *Beech v. Setzkorn*, 1928 C.P.D. 500, the plaintiff pedestrians failed in their action since they were unable to establish that the defendant could, by the exercise of reasonable care, have avoided the accident after becoming aware that the plaintiffs were in a position of danger. Today damages would be apportioned. Similarly, where the accused was passing a stationary tram at a distance of about 16 feet and a child had suddenly rushed across the intervening space and collided with his car, the Court came to the conclusion that he could not be said to have been driving negligently having regard to the fact that prospective passengers on his left might have diverted his attention at that moment (*R. v. Senekal*, 1931 P.H., O. 9 (E)). See also *Benjamin v. R.*, 1931 P.H., O. 12 (T); *R. v. Cimmera*, 1938 P.H., O. 53 (T), and *R. v. Cooper*, 1938 N.P.D. at 183. The position is different, however, where the driver sees that there are children behind a stationary van, because young **children** are liable to do headlong and unreasonable things (*Soper v. Watney*, 1934 C.P.D. 203).

Once the driver takes it upon himself to go on to the **wrong side** of the road to pass a stationary tram or bus he should be extremely careful and should go at a slow speed and keep a sharp look-out (*R. v. Marais*, 1932 P.H., O. 42 (C)). In this case he was held to have rightly been convicted of negligent driving. In *R. v. Nell*, 1937 E.D.L. 234, however, the Court ruled on the facts that the accused was not, in the circumstances, guilty of negligence.

(iii) *Passing oncoming traffic*

The primary duty of the driver is to keep to his left of the road and to allow the approaching traffic to pass on his right (*Mayers v. Lemonsky*, 1924 C.P.D. 425), and his failure to comply with this rule will usually, should an accident occur, be construed as negligence against him (*Morley v. Wicks*, 1925 W.L.D. at 21, and *De Wet v. Adams*, 1935 T.P.D. at 251 (see *ante*, p. 352)). But this fact will not make him criminally liable for the death of the other party unless his negligence in this respect was the proximate cause of the disaster (*R. v. Hawken*, 1934 E.D.L. (J/C 380/1934)). In this case the accused was driving a motor-bus on a public road at about 20 m.p.h. Owing to the camber of the road the bus was not keeping on its correct side, its right-hand wheels being a distance of some 2 feet over the centre of the road. The deceased, on a push-cycle, was approaching from the opposite direction at such a distance from his left-hand side of the road that, had both vehicles adhered to their respective courses, they would have passed each other at a distance of some 4 feet. When less than 5 yards separated the vehicles, the deceased suddenly swerved to his right and was killed. Held, that his death was attributable solely to his swerve, and the conviction was accordingly set aside.

(c) WHEN BEING OVERTAKEN: 'ROAD-HOGGING'

The duty of the driver of a vehicle about to be overtaken by another is to move over as far as possible to his left of the road, having due regard to the safety of his vehicle (*R. v. Easthorpe*, 1948 P.H., O. 5 (N)), unless (a) he intends turning to his right and has signalled his intention to do so,

or (b) in an urban area where the street is wide enough to permit two lines of traffic (see section 109(1)(b)(ii)). (See *ante*, p. 450.)

Where, therefore, a lorry-driver kept ahead for 7 miles and refused to allow the driver of a motor-car behind him to pass him despite repeated requests to do so, the Court held that he had rightly been convicted of the offence of failing to show reasonable consideration for other persons using the road (*R. v. Delport*, 1942 E.D.L. 209). The foremost driver cannot, however, be faulted for failing to allow a following driver to overtake at a place where it would be unlawful, or unsafe, to pass (*R. v. Reddy*, 1948 (2) S.A. 1047 (N)).

5. FOLLOWING VEHICLE TOO CLOSELY AND RUNNING INTO A CAR FROM BEHIND

In following a vehicle ahead of him the driver of a car ought to adjust both his **speed** and the **intervening space** between his car and the vehicle which he is following so that he is able to pull up or swerve in the event of a sudden stoppage on the part of that vehicle (*Abdool v. Slade*, 1931 N.P.D. 4). Per Carter J.:

'I do not think there is any doubt but that Razack was negligent in his driving. It is common cause that he was driving the car in question on a down grade in a wide thoroughfare which was clear of traffic and that he followed another car, being at a distance of 8 to 10 feet from the car in front of him. The preceding car turned suddenly to its right and Razack was unable to manoeuvre the car he was driving so as to avoid an accident. Any person who drives a car such a short distance behind another, unless he is forced by circumstances to do so, is to my mind negligent and is inviting peril unless he exercises the greatest degree of caution and is fully alert to the movements of the car in front. There was no need to be so closely behind the car in front and probably this close proximity was the cause of the accident.'

Abdool v. Slade has been followed in *Reemers v. A.A. Insurance Association*, 1962 (3) S.A. 823 (W) at 825, and *Coleman v. Mabuza*, 1963 (2) S.A. 498 (T) at 500.

Where a following car driver collides with the car ahead of him, which has been obliged to stop suddenly, it is not sufficient for the driver of the leading car merely to rely on the fact of a collision and to suggest that the driver behind was travelling too fast, since the onus of proving negligence is always on the plaintiff (*Coleman v. Mabuza (supra)*). In this case there was supporting evidence on behalf of the defendant that his brakes failed unexpectedly.

A driver of a motor-car in a stream of traffic, who chooses to follow the vehicle in front of him at a distance of about 5 yards, is not entitled to assume that a speed which may be safe for the leader of the column is a safe speed for him. He must, if he is to avoid the imputations of negligence, so **adjust his speed and his distance** from the vehicle in front of him that he is able to pull up in the column of traffic in a way which avoids his vehicle coming into contact with the preceding vehicle should that vehicle make a sudden stop (*Goldstein v. Jackson's Taxi Service*, 1954 (4) S.A. 14 (N)), followed in *Coleman v. Mabuza (supra)*, see also section 119(b) of the Ordinances.

Provided the red lights at the back of a vehicle are in order and flash on the instant the brakes are applied, their doing so may be, in general, a

sufficient signal to following traffic that the driver intends stopping or checking his vehicle. This is especially so where one vehicle is following another at close quarters in a dense stream of traffic. While a **hand signal** is desirable, the omission to give it is not, in all cases, an indication of the driver's negligence (*ibid.*).

In *Auld v. M'Bay*, 8 R. 495, the facts of which were that some children were running behind an omnibus which was, in turn, followed by another omnibus. One of the children fell and the driver of the following vehicle could not avoid running over him. Held, that he was negligent in following the preceding vehicle so closely that he could not pull up in an eventuality of this nature. Another decision on the same point is that of *Carnarvon Bus Service v. Haile*, 1930 P.H., J. 19 (C). Here two buses were proceeding along the main road, the plaintiff's bus being 35 feet behind the leading bus. The leading bus, without giving proper warning, suddenly stopped at a place which was not a stopping-place for buses. In an action for damages the Court held that the driver of the plaintiff's bus was guilty of contributory negligence in that, either he was travelling in such a way that he could have pulled up in an emergency and did not do so, or he was travelling too fast and too near the defendant's bus to be able to pull up in time. For the case of a cyclist running into a pedestrian from behind, see *Davies v. Union Govt.*, 1936 T.P.D. 197, followed in *Coleman v. Mabuza (supra)*.

These cases are to be contrasted with that of *R. v. Wallach*, 1934 T.P.D. 293, where the accused had been convicted of negligent driving. It appeared that he was driving at **night-time** behind another car, at a distance of 18 feet, and at a speed of 30 to 35 m.p.h. The former car suddenly came upon an unlighted lorry standing in the road and pulled up suddenly. The accused, in order to avoid colliding with this car, swerved to his right on to the incorrect side of the road and, at the crucial moment, collided with the plaintiff, who was travelling on a motor cycle in the opposite direction. On appeal it was held that he had been wrongly convicted, since he had been placed in a sudden emergency by the car in front of him. The Court appears to have overlooked, however, the fact that, travelling at 30 to 35 m.p.h., it is impossible to pull up in 18 feet, and, further, that it is not unusual for the car ahead, like this, suddenly, on meeting an unlighted obstruction such as a vehicle, a cow, a pedestrian, a stone or an excavation, to stop suddenly; and, in particular, that dangers of this character are accentuated by the fact that at night-time one's range of vision is considerably limited. It is submitted, therefore, that what emergency there was, was preconditioned by the accused's own negligence in travelling at that speed so close to the car in front without, at the same time, having a good view of the road ahead, and that the appeal was wrongly upheld. In this respect the dictum of Solomon J. in *Robinson v. Henderson*, 1928 A.D. at 142, is pertinent:

'If every driver of a motor-car were a reasonable man there would be few accidents; it is against the reckless driver that one has to be on one's guard.'

See also *Van der Merwe v. Union Govt.*, 1936 T.P.D. 185, *ante*, p. 368; *Van Staden v. May*, 1940 W.L.D. 198; *Frodsham v. Aetna Insurance Co.*, 1959 (2) S.A. 271 (A.D.) at 279, and *Van den Bergh v. Parity Insurance Co. and another*, 1966 (2) S.A. 621 (W) at 625. (Reversed on appeal (1966 (4) S.A. 463 (A.D.)), but not on this point.

It is submitted that whether or not the court will condemn a driver for following too closely behind a vehicle ahead of him will depend on the circumstances of each particular case, regard being had to: (a) the speed of the vehicles concerned; (b) the amount of traffic on the road at the time; (c) the visibility which the driver in the following car has of the road ahead, and (d) the character of the road in question. (See *R. v. Ramokepe*, 1942 O.P.D. 117.) Generally one should allow one car length for every 10 miles per hour of speed, so that if one is travelling at 40 miles per hour one should not be closer to the vehicle ahead than four car lengths.

The question whether a cyclist may not be guilty of contributory negligence in failing to carry a ruby reflector on the back of his bicycle was considered, but not decided, in *R. v. Shalovsky*, 1935 P.H., O. 34 (S.R.). The regulations under various Ordinances now make it compulsory to carry ruby reflectors at the back of one's vehicle (section 59(4)).

Two lanes of traffic narrowing

Where there are two lanes of traffic narrowing into one lane, it is the duty of the motorist to give way to the other vehicle slightly ahead of him (*R. v. Vosconselos*, 1966 (3) S.A. 683 (R.A.D.)).

CHAPTER XXI

ANIMAL-DRAWN VEHICLES AND CYCLES

All the provincial Ordinances have prescribed certain rules to be observed vis-à-vis other road users, as follows:

ANIMAL-DRAWN VEHICLES

126. (1) No person shall operate an animal-drawn vehicle on a public road unless the name and address of the owner thereof is affixed or painted in a conspicuous position on the left side of such vehicle in letters not less than one inch high: Provided that nothing herein contained shall apply to a vehicle used solely for the conveyance of persons otherwise than for hire or reward.

(2) No person shall operate an animal-drawn vehicle on a public road unless the vehicle and the harness and other equipment thereof are in an efficient and safe condition.

(3) The owner of an animal-drawn vehicle shall not cause or permit such vehicle to be used on a public road by any person who is not competent whether by reason of his age or otherwise to drive and control such vehicle.

(4) The driver of an animal-drawn vehicle on a public road shall at all times give his undivided attention to the driving of the vehicle under his control and, if the vehicle is standing on a public road, the driver shall not cease to retain control over every animal which is still harnessed to the vehicle unless some other person competent to do so takes charge of every such animal or every such animal is so fastened that no such animal can move from the place where it has been left.

(5) No person shall operate a vehicle drawn by a team of animals not controlled by reins on a public road, unless there be a person leading the team and exercising control over such team.

(6) The driver or other person in charge of a vehicle drawn by any animal shall not, on a public road outside an urban area, permit such vehicle to follow any other vehicle similarly drawn at a distance of less than five hundred feet reckoned from the foremost animal of such first-mentioned vehicle, except for the purpose of overtaking a vehicle travelling at a slower speed or when a vehicle travelling at a greater speed, having overtaken such vehicle, is drawing away from it.

MOTOR CYCLES OR MOTOR TRICYCLES

120. (1) No person shall drive a motor cycle or motor tricycle on a public road unless his feet are resting on foot rests suitable for the purpose and, where the design of such motor cycle or motor tricycle makes it possible to do so, he is seated astride on the saddle of such motor cycle or motor tricycle.

(2) No person shall on a public road carry a passenger on a motor cycle unless such cycle has an engine with a cylinder capacity exceeding fifty cubic centimetres and unless such passenger is seated in a side-car or astride a pillion attached to such cycle and, in such latter event, foot rests have been provided for such passenger.

(3) Subject to the provisions of subsection (2), not more than two persons shall ride upon a motor cycle on a public road excluding a person riding in a side-car attached to such motor cycle.

(4) Not more than two adult persons shall be carried in a side-car attached to a motor cycle on a public road.

(5) No person or animal or article shall be carried on a motor cycle or motor tricycle on a public road in front of the driver thereof: Provided that an article of a non-bulky nature may be so carried if securely attached thereto or placed in a suitable carrier fitted thereon for that purpose and carried in such a way as not to obstruct the driver's view or prevent his exercising complete control over such motor cycle or motor tricycle.

(6) (a) Persons, other than a police officer, driving motor cycles on a public road shall drive in single file except in the course of overtaking another motor cycle and two or more persons driving motor cycles shall not overtake another vehicle at the same time: Provided that where a public road is divided into traffic lanes, each such lane shall, for the purposes of this paragraph, be regarded as a public road.

(b) For the purposes of paragraph (a), a motor cycle shall include a motor tricycle.

(7) No person driving a motor cycle or motor tricycle on a public road shall take hold of any other vehicle in motion.

RIDING OF PEDAL CYCLES

123. (1) No person shall ride a pedal cycle on a public road unless he is seated astride on the saddle of such pedal cycle.

(2) Persons riding pedal cycles on a public road shall ride in single file except in the course of overtaking another pedal cycle and two or more persons riding pedal cycles shall not overtake another vehicle at the same time.

(3) No person riding or seated on a pedal cycle on a public road shall take hold of any other vehicle in motion.

(4) No person riding a pedal cycle on a public road shall deliberately cause such pedal cycle to swerve from side to side.

(5) No person riding a pedal cycle on a public road shall carry thereon any person, animal or article which obstructs his view or which prevents him from exercising complete control over the movements of such pedal cycle.

(6) A person riding a pedal cycle on a public road shall do so with at least one hand on the handle-bars of such pedal cycle.

(7) Whenever a portion of a public road has been set aside for use by persons riding pedal cycles, no person shall ride a pedal cycle on any other portion of such road.

CHAPTER XXII

TRAMS, BUSES AND TRAINS

SUMMARY

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1. TRAMS AND BUSES

Tramcars have become obsolete today, their place having been taken by diesel-engined omnibuses which have been dealt with *supra* as being included in the category of motor vehicles, and electric trolley buses which, in some degree, by reason of their restricted lateral movement, approximate to trams and, for this reason, it is instructive to refer to the dictum of Wessels J. (as he then was) in *Baratz v. Johannesburg Municipality*, 1913 T.P.D. 732 at 738-41, which has been referred to and applied in a large number of decisions subsequently. Here he said:

‘The Magistrate has also expressed the view that the tram service stands, within reasonable limits, on the same footing as a railway service. I can find nothing in the law books to justify that view. A tram service would be more analogous to an omnibus service, except for the fact that trams are obliged to go upon a track. A tram has no exclusive right to use the track. It is true a tram should keep as much as possible to its appointed times, but the safety of the public is of paramount importance, and cars are not to be run to the danger of the public merely so that they may arrive at their termini at the scheduled times.

‘There is no negligence per se in crossing a street, even though there be tram tracks upon it, for **passengers on foot have as much right as vehicles to use every part of the streets of a town**. There is no obligation on the part of a foot-passenger to remain upon the pavement and only to cross at a recognized crossing. A foot-passenger is as much entitled to be on the carriage-way as the vehicles themselves. (See notes to *Stringer v. Frost*, 9 Amer. State Reports 879.) The right to use the highway or street is, therefore, common to foot-passengers and vehicles. Their rights are equal, the **one has no superior right to the other**. Even if the foot-passenger is infirm from disease, he has a right to walk in the carriage-way and is entitled to require from the drivers of vehicles the exercise of reasonable care (*Boss v. Litton*, 5 Car & P. 407).

‘A tramcar is in no different position in this respect from any other vehicle. Though the municipality is authorized by the legislature to lay a track upon the public street the drivers of tramcars have no right to run the cars on the track as if they had an exclusive right there. Except for the necessary limitations in the movement of a tramcar it has no greater privilege than ordinary vehicles, and therefore, as a general rule, the drivers of tramcars must use the same diligence as the drivers of ordinary vehicles when moving in streets. Thus in the case of *Rattle v. Northwich Electric Tram Co.*, 18 T.L.R. 562, a horse became restive at the approach of a tramcar and the driver of the horse held up his hand and shouted to the motorman to stop. The latter disregarded the signal and drove on without slowing down or stopping, and so caused an accident. The Court of Appeal held that a municipal tramcar, like every other vehicle, must take reasonable care not to injure persons using the highway.

‘In *Dublin Tramways Co. v. Fitzgerald*, 72 L.J. P.C. at 54, [1913] A.C. 99 at 103, Lord Halsbury said: “Tramways are not to have a monopoly of the highway; passengers, horse and foot, are to be allowed to cross these tramways as freely as they were before [they got these statutory powers] except where they will be intercepting or interfering with the use of the tramway as such.”

‘There is, however, this difference between tramcars and other vehicles. **A tramcar cannot swerve** and cannot avoid an obstacle otherwise than by slowing down or stopping, whereas other vehicles can. Hence, vehicles and **foot-passengers** must necessarily, under certain circumstances, **give way** to tramcars so as not to put the latter at too great an inconvenience, but on the other hand, as tramcars have **no absolute and exclusive right** to that part of the street where the track is, their drivers cannot insist upon all other vehicles and all foot-passengers getting out of their way at whatever cost and inconvenience. Both tramcar drivers and foot-passengers must act reasonably and recognize that the one is as much entitled to use the street as the other. This is the law laid down in the recent cases of *Hartley v. Chadwick*, 68 J.P. 512; *D. Mews’ Dig.* Supp. 14, p. 2138, and *Rattle v. Northwich Electric Tr. Co.*, 18 T.L.R. 562.

‘At the same time a foot-passenger who uses the street must take reasonable care of himself. The more dangerous that part of the street is on which he finds himself, the more care must he take. If, therefore, he crosses over a street on which there is a network of tram-rails he must keep a vigilant look-out and avoid inconveniencing the tram-drivers or obstruct-

ing the traffic, for it is as much the **duty of the foot-passenger to look out for trams** as it is the duty of the tram-driver to be vigilant in not driving against foot-passengers (*Cotton v. Wood*, 8 C.B.N.S. 568; 29 L.J. C.P. 333).

“The foot-passenger must use all reasonable care when he comes upon a tram-track or series of such tracks, to see that there is no car upon the track, because he must know that the tramcar can only move on the track; in this respect his **duty** seems to be **more onerous** than if he finds himself on the **carriage-way**. In the latter case it does not appear to be negligence *per se* for a foot-passenger not to look up and down the street before crossing (*Bowser v. Wellington*, 126 Mass. 391; *Williams v. Grealy*, 112 Mass. 79; *Shapleigh v. Wyman*, 134 Mass. 118; quoted in note to *Stringer v. Frost*).

“If, however, a foot-passenger crosses a series of tracks he need not look up and down each track as he reaches it. It is enough if he takes a general survey of the tracks. The care he must use is reasonable care, not meticulous exactness.

“It is the duty of the **driver of the tramcar** to keep his eyes on the track just as it is the duty of the driver of a vehicle to look in front of him. He may expect of the public that they will use due diligence in crossing the track and that they will keep a reasonable look-out for tramcars, but he must not expect the public, in crossing the track, to think of tramcars and tramcars only, for there are other vehicles and other matters to be attended to in crossing the street. Hence, if the driver sees a foot-passenger cross the track in front of his car he must keep his attention on the passenger, and if he realizes that the passenger is, by reason of some infirmity or otherwise, not vigilant and **not sufficiently aware of the danger**, it is still the driver’s duty to do everything in his power to avoid an accident. He must bring his car to a **dead stop** rather than risk an injury to a fellow-being. In *Clark v. Petrie*, 16 Sc. L.R. at 626–7, Lord Moncrieff said: “When a driver of a machine in broad daylight drives down a person crossing, where he had a perfect right to cross, the presumption in fact, and in law, is that he was at fault and the sooner this is understood the better.” Lord Gifford said: “But when he did see her, even then he was in fault, for when he called out he was bound so to drive that, in case she did not hear, no accident should occur. I cannot think there was contributory negligence on the respondent’s part.” This case is quoted with approval by *Beven on Negligence*, vol. I, p. 459.

“In *Couper v. McKechnie*, 24 Sc. L.R. at 252, the Court said: “There is no doubt as to the mutual relations to one another of drivers of wheeled vehicles on the high road and passengers on it. We have frequently before now had occasion to consider them. There is an obligation incumbent on the former to take care not to come into contact with the latter. If the fault of the latter leads to an accident that is a different matter.”

The provincial Ordinances now provide that the driver of a vehicle, intending to pass a stationary bus on a public road, shall do so with due care for the safety of persons who are approaching or leaving or who may approach or leave such bus (sections 109(7) (T), (O) and (C) and 109(5) (N)).

Cases

The following are instances of the respective liabilities and rights of tram-drivers and other persons using the same streets:

The driver of plaintiff's car, in entering a street in which there were tram-lines, looked to her left and saw a tram a good distance away and far enough for her to think it was safe to cross, which she did at a slow pace and in a gradual right-hand turn. As she was straightening out she was struck from behind by the tramcar. Held, that the driver of the tram was negligent in failing to keep a proper look-out, failing to sound his gong, and failing to apply his brakes in time to avert a collision (*Port Elizabeth Tramway Co. v. McAuliffe*, 1934 E.D.L. 170; see also *Marvin Sigurdson v. British Columbia Electric Rly., Ltd.* [1953] A.C. 291).

Where, however, both the tram and motor-car entered an intersection at an excessive speed and where the drivers of both had failed to keep a proper look-out the Court held, in an action for damages by the motor-car driver, that his claim must fail (*Johannesburg Municipality v. Darbyshire*, 1909 T.S. 386).

Complainant was being driven in a trap up a street on his right side and came upon a motor-car drawn up in front of him. In order to pass it was necessary for the course of the trap to be deflected in such a manner that it would probably traverse the tram-lines in the street. The accused, who was driving a tram behind the trap at a reasonable speed, observed these facts and realizing this possibility had, nevertheless, continued to approach the trap, sounding his gong without slackening his speed. As the trap deviated to pass the parked car it was struck by the tram. Held, on appeal, that the accused had rightly been convicted of negligent driving in contravening section 2, Act No. 13 of 1886 (Cape) (*R. v. Grundlingh*, 1924 E.D.L. 137). Similarly, where the complainant, in seeking to make a turn, found that his engine had suddenly stalled, the Court held that the tram-driver, who, though noticing in time to stop that complainant was in this predicament, had yet nevertheless failed to stop, had rightly been convicted of negligent driving (*R. v. Fowler*, 1930 P.H., H. 77 (C)).

See also *Durban Corporation v. Raghuo*, 1938 N.P.D. 506. In this case R approached a right-hand intersection in his bus. When he got near the robot it showed green, and he rounded it to proceed right. A tramcar, approaching on his left as he made the turn, collided with him. As he commenced the turn it was about 60 yards away. The speed of the bus was reduced owing to a motor-car in front slowing down. Held, that R was not negligent, that the bus must have made an obvious obstruction and should have been observed by the driver of the tram had he kept a proper look-out, that the bus-driver, R, was entitled to rely on the tram-driver keeping a proper control of his vehicle, and that the collision was the negligence of the tram driver in not keeping a proper look-out and in driving at too great a speed in the circumstances. This rule is based on the simple rule indicated above that the tram has no paramount right of way and the driver thereof must avoid an accident if he possibly can. See also *Fachidien v. City Tramways Co.*, 10 C.T.R. 38.

A double tramway track was laid past the entrance to a race-course. The defendants had assembled a number of trams on the south track in an unbroken line save for a gap of about 17 feet immediately opposite the entrance to the race-course. The gap was not wide enough to afford a view through it of trams on the north track as vehicles entered the race-course. Complainant's driver was, on entering the race-course, struck by a tram on the northern rails, and the Court held that the driver of the tram, knowing that vehicles were coming through this gap, had been negligent in failing to sound his gong to warn the drivers thereof of his approach (*S.A. Taxi Cab Co. v. Johannesburg Municipality*, 1910 W.L.D. 124).

A passenger was mounting a tram when it suddenly and without warning commenced to move off. He fell and was injured. Held, that he was entitled to damages (*Jacobson v. City Tramways Co.*, 8 C.T.R. 376). It is not, however, negligence on the part of tramway servants to allow a minor child to stand on the front platform of a tram, the gates of which are closed, since, if any danger exists, it is a familiar and obvious danger, and the tramway officials are entitled to take into account the fact that reasonable parents will not permit their children to be sent to familiar and obvious dangers except under protection of guardianship (*Johannesburg City Council v. Venter*, 1936 T.P.D. 287).

For the law regarding the duty of a tram-driver when approaching a restive or frightened horse see *Metropolitan Tramways Co. v. Stubbs*, 1924 C.P.D. 446.

2. TRAINS

The position of trains differs from that of all other vehicles inasmuch as they have an **exclusive right to their track**, except where it crosses a road or path used by other traffic; and even at such a crossing they are accorded a **preferential right**, owing to their speed and the difficulty of stopping them in a short space (*Worthington v. C.S.A.R.*, 1905 T.H. 149; *Dyer v. S.A.R. & H.*, 1933 A.D. 10 at 19; *R. v. Johnsen*, 1948 (2) S.A. 203 (N); *De Vaal v. S.A.R. & H.*, 1965 (1) S.A. 402 (T) at 404-5).

Since the railways are run under such statutory authority, the Administration, as already explained (*ante*, p. 37), is not liable for the consequences of their operation unless in such operation there has been negligence. In every case, therefore, unless the Act creates an absolute liability (as to some extent it does in the case of stock run over), the foundation of an action against the Administration must be *culpa* (cf. per Wessels C.J., in *S.A.R. v. Bardeleben*, 1934 A.D. at 480).

In dealing with the acts which may constitute such *culpa*, it is convenient to distinguish between (a) damage to animals, and (b) damage to vehicles and pedestrians. Damage to **passengers** is also dealt with *ante*, pp. 178 and 428.

(1) DAMAGE TO ANIMALS

The Fencing Act, No. 31 of 1963, provides that the owner of any railway line which traverses any holding shall, at his own expense, erect and maintain on either side of such line a sufficient fence with adequate crossing facilities at every place where a public road traverses such line and also at any other place where such facilities are reasonably necessary in order to enable livestock to cross such line from one part of such holding to another: Provided that half the cost of such facilities required at any such other place shall be paid by the owner of the holding traversed. Also, gates shall be erected of such number and structure in any such fence as may be agreed between the owner of the line and the owner of the holding, or in default of agreement, as determined by a board appointed under the Act. The State President is empowered by proclamation to exempt any area from the operation of this section.

Many areas have been exempted by proclamation from the operation of this section, but where it applies, failure to erect and maintain a **sufficient fence** will be a breach of duty giving rise to an action for damages at the hands of anyone injured by the neglect (*Mills v. S.A.R. & H.*, 1923 E.D.L. 334). In this case a heifer got over a railway fence and was killed by a train. The Court here held that the fence was not in fact 'sufficient' for ordinary farming requirements and that the Administration was therefore liable for the damage suffered.

Even if a sufficient fence is maintained, and also in areas where the Administration is excused from the duty of fencing, there still remains the common-law obligation on the part of the Administration to exercise due care in avoiding damage. The statute referred to above has, however,

carried the matter further, Section 38 of the Railways Act, No. 70 of 1957, provides that the Administration shall **make compensation** to the owner of any **stock killed** or injured by any train; provided that no compensation shall be payable in respect of any stock killed or injured where the killing or injury is due to the want of ordinary care or diligence of the owner or his servant. Notice must be given to the Administration within seventy-two hours of the injury. Carcases must be kept for three days for inspection, and a maximum scale of compensation is provided for.

The effect of the section was considered in *S.A.R. v. De Bruin*, 1919 T.P.D. 230, where Wessels J. said:

'If it be proved that the death of the stock was due to the negligence of the owner he has no case. But if it be shown that, even though the owner may have been negligent to allow his cattle on the line, the actual killing or injury was due to the negligence of the engine-driver, the ordinary principles of the common law apply, and the Administration is liable.'

Where, therefore, both the cattle-herd and the driver of the train were negligent, but the decisive cause of the killing was the negligence of the driver of the train the owner is entitled to compensation (*ibid.*). In *Elphick v. S.A.R.*, 1920 T.P.D. 316, it was held that, though the Administration was specially exempted by proclamation from having to fence that area, the plaintiff was still entitled to damages for injury to cattle which had strayed on the line, although there was no negligence on the part of the railway servants, for the reason that there was no want of care on the part of the owner of the cattle.

Notwithstanding the statutory remedy, the **common-law remedy still exists** (*Union Govt. v. Harrison*, 1921 A.D. 11), but in such an action negligence must be both averred and proved (*ibid.*).

(2) DAMAGE TO VEHICLES AND PEDESTRIANS

The law of running down by trains is the **law of the level crossing**, for on other parts of the track the train has an exclusive right, and the driver need not expect to find others using it; though, of course, if he does see others on the track, he must do all he can to avoid a collision.

The law of the level crossing was laid down by Solomon J. in the case of *Worthington v. C.S.A.R.*, 1905 T.H. 149, in words which are still of full force and effect.

'The level crossing is common both to the railway and to the public. Each has the right to pass over it, and to expect that due care will be exercised by the other to avoid mishaps. But it is quite clear that a train cannot be expected to pull up at a crossing to allow passengers by road to cross. The train must necessarily have the preference over passengers by road. It is the duty of the traveller to look out for, and wait for, the train. At the same time the train is bound to give due and timely warning of its approach, and also not to be travelling at such an excessive speed that the warning it might give should be of no avail. What is an excessive speed and what is due warning must entirely depend on the special circumstances of each case. But even if a train, in approaching a level crossing, does not give due and timely warning of its approach, that in itself does not relieve a person who is travelling along the road from the necessity of taking every care in crossing the line. A level crossing must always have a certain element of danger, and any person before crossing the railway should exercise due and proper care in order to see that a train is not approaching. Neglect on the part of the railway officials in not giving warning of its approach is no excuse whatever for neglect on the part of anyone travelling

along the road. Anyone so travelling is bound to use his eyes and ears, and if he does not, he is primarily responsible for any injury he may sustain.⁷

See also *Walker v. Rhodesian Railways*, 1937 S.R. 62 at 73; *R. v. Herbst*, 1948 (2) S.A. 201 (N); *Dyer v. S.A.R.*, 1933 A.D. 10 at 19; *Celliers v. S.A.R. & H.*, 1961 (2) S.A. 131 (T) at 135, and *De Vaal v. S.A.R. & H.*, 1965 (1) S.A. 402 (T) at 405. From these and *Worthington's case (supra)* the following propositions may be gathered:

- (a) The train has the preferent right;
- (b) but the Administration owes a duty to others in respect both of warning and of speed;
- (c) the road-user also owes a duty, both to himself and to the Administration to keep a careful look-out.
- (d) this duty exists in respect of any and every crossing, since every crossing is potentially dangerous;
- (e) the fact that the Administration may neglect its duty does not excuse the road-user from performing his, and if he suffers damage from his own neglect he will now have to suffer apportionment of damages.

The duty of the Administration exists whether the crossing is a public or a private one (*Morrison v. S.A.R. & H.*, 1948 (3) S.A. 208 (T)), and particularly at night. The driver must announce the approach of the train by appealing both to the sight and hearing of the traveller on the road (*Matcheke v. S.A.R. & H.*, 1948 (1) S.A. 295 (T)). The appeal to sight can only be discharged by displaying on the forefront of the train a **headlight** sufficiently distinguishing or powerful to give adequate warning of its approach (*ibid.*; see, also, *Smart v. S.A.R.*, 1928 N.P.D. at 133; *Walker v. Rhodesian Railways*, 1939 S.R. at 73; *Geldenhuys v. S.A.R. & H.*, 1964 (2) S.A. 230 (C); see *post*, 472).

(3) DUTY OF THE TRAVELLER BY ROAD

Duty to look and listen

It is the paramount duty of the road-user not to venture upon a level crossing until he has taken due precautions to satisfy himself that he may safely do so. The primary duty of the road-user is to **look** and **listen** and, in the event of his view being obstructed, or circumstances existing which might possibly hinder his hearing, it is his duty either to drive slowly so that he can pull up immediately in the event of a train approaching or, if necessary, to stop at the crossing to make certain that there is no train approaching (*Hoffman v. S.A.R. & H.*, 1966 (1) S.A. 842 (A.D.) at 851). In view of the potential danger of any crossing, and the preferent right of the train, this duty is an extremely stringent one; no neglect by the Administration will absolve him from it (*Celliers v. S.A.R. & H.*, 1961 (2) S.A. 131 (T); *S.A.R. & H. v. Orford*, 1963 (1) S.A. 672 (A.D.) at 676), and only in the most exceptional circumstances will any lesser standard than that of the utmost care be tolerated. In order so to satisfy himself, the road-user, whether pedestrian or driver of a vehicle, must **use his eyes** and his **ears**, for to cross against the red flashing lights without looking out for an approaching train is an act of negligence (*R. v. Damon*, 1949 (1) S.A. 164 (C)); if by any reason visibility is obscured, he must take all the greater

precautions in other respects; and if he cannot otherwise make sure that the crossing is safe he must even stop his vehicle (*Union Govt. v. Buur*, 1914 A.D. at 286-7; cf. *Mancho v. S.A.R.*, 1928 A.D. at 100; *Amalgamated Collieries v. Kloppe*, 1945 O.P.D. at 117; and *Visser v. S.A.R. & H.*, 1953 (2) P.H., O. 13 (O)). In the Transvaal all rail-crossings are demarcated by 'stop signs' enjoining the road-user actually to bring his vehicle to a halt before proceeding to cross the railway line (see also 'Stop Streets', *ante*, p. 368).

Although the **duty** is extremely **stringent**, it is **not absolute**; it is not the law that the road-user enters upon a crossing at his peril (*Mancho's* case at 108). The duty is to exercise such precautions as would be taken by a prudent man in the circumstances. And though there can, it would seem, never be circumstances which could excuse a failure to take care, and the greatest care, by looking and listening, to see that the line is clear, there may be circumstances which, in a particular case, will excuse a failure actually to perceive a train in time to avoid a collision (see *R. v. Bentley*, 1949 P.H., O. 29 (E)). Thus in *Celliers v. S.A.R. & H.*, 1961 (2) S.A. 131 at 141-2, the Court found that the road-user was not to blame because of his momentary inattention in failing to see some red lights held by two railwaymen more than 60 yards away, and which might have been confused with the neon lights in the background. It is impossible, of course, to give a catalogue of such possible circumstances; but factors which, usually in combination with one another, may go to excuse such a failure are (a) the condition of the crossing, which renders it especially difficult to see a train (*De Beer's* case, 1936 A.D. 262, which however was an action by dependants; *Mancho's* case), (b) the fact that the train itself was peculiarly difficult to see (*Wilkinson's* case, 1916 A.D. 123 (no tail-light—a jury case); *Danoher's* case, 1932 E.D.L. 251 (unusually low, flat trucks stationary on the crossing), and (c) the fact that the plaintiff was legitimately put off his guard by some previous conduct on the part of the Administration (*Mancho's* case). But such facts as that the sun was in the plaintiff's eyes (*Holl's* case, 1929 T.P.D. 936), or that one train having passed, the plaintiff had then assumed that no other would come by (*R. v. Lombard*, 1936 T.P.D. 89, and cf. *Buur's* case, 1914 A.D. 273), will be no excuse. In *De Vaal v. S.A.R. & H.*, 1965 (1) S.A. 402 (T), where the plaintiff knew that there was a level crossing but, owing to the dense fog, was unable to find it while searching for it and his car was struck by the last truck of a passing train, it was held, that the defendant had not in any way been to blame.

Plaintiff put off guard

In *Mancho v. S.A.R.*, 1928 A.D. 89, it was recognized that it may be an element in the question of the plaintiff's negligence, that he was put off his guard by some previous conduct of the Administration, which has **led him to expect a warning** which, in fact, is not given. In that case the evidence showed that on many previous occasions at that crossing a railway servant had given warning by holding up his hand; so that the deceased man, knowing of this practice, was put off his guard when no such warning was given (*R. v. Bentley*, 1949 P.H., O. 29 (E), and *Minister of Railways v. Meets*, 1953 (3) S.A. 615 (T); see also *post*, p. 472). He can also have been put off his guard by reason of there being no headlights to the train at

night, or only a dim light. (See *post*, pp. 474 and 479.) This fact was treated as only **an element** in the question of negligence; other elements being the extremely dangerous nature of the crossing and the fact that by reason of surrounding noise and the proximity of buildings, no precaution short of that of dismounting and actually walking on to the line would have availed (see per Stratford J.A. at 108). It is clear that this **principle will be most sparingly applied**; that it will apply only to crossings of exceptional danger. See *Amalgamated Collieries v. Klopper*, 1945 O.P.D. at 117. (It was applied in *Danoher's* case, 1932 E.D.L. 251, which is summarized *post*, p. 473.) Once the crossing is recognized as dangerous, then a failure by the Railways to continue a particular form of warning can lead a party into a false sense of security. (See *Geldenhuis v. S.A.R. & H.*, 1964 (2) S.A. 230 (C), cited *post*, p. 476.) That party will be disentitled from recovering (his full damages) only if, by the exercise of the slightest care on his part, he could have avoided the collision (*S.A.R. & H. v. Meets*, 1953 (3) S.A. 615 (T)). One set of facts to which it might well be applied would be where a crossing is protected by **booms**; if the booms were negligently left open this would certainly be an important element in judging the conduct of one who entered upon the crossing. But that a failure to close **gates** will not entitle a driver to assume that he may safely cross is shown by *Buchanan's* case, 1915 N.P.D. 95, and *McRitchie's* case, 1918 N.P.D. 311, and *Mercer v. S.E. & C. Railway Co.* [1922] 2 K.B. 549, though even here, if the plaintiff could show that from previous experience he had concluded that the gates were always shut when a train was approaching, this would constitute an element to be taken into account in judging his conduct.

In the case of *Barry v. S.A.R.*, 1941 A.D. 168, it was held that though the plaintiff had been negligent in relying solely on **flashing lights** at a crossing, and in not also keeping a proper look-out, he was entitled to damages. See also *Mercer v. S.E. & C. Railway Co.* [1922] 2 K.B. 549 and *post*, p. 383.

Side-curtains

One factor in the conduct of a driver which has been present in several cases is that side-curtains of celluloid or other imperfectly transparent material have to some extent limited the driver's vision and hearing. While it is clearly not negligent to approach a crossing with these curtains up (the Canadian case of *Kinnee v. British Columbia Railway*, cited *English and Empire Digest*, vol. 36, p. 60, note (h), would probably not be an authority for so wide a proposition even in Canada), the fact, if it be a fact, that the driver's vision or hearing is impaired by them will impose the duty of taking special precautions (*Wright v. Stuttgartford*, 1929 E.D.L. at 399). In *Jacobs v. Union Govt.*, 1919 A.D. 325, the flaps were of canvas and thus impervious to sounds. In *De Beer's* case, 1936 A.D. 262, and *Stegman's* case, 1932 A.D. 318, celluloid side-flaps figured, but in neither case was it suggested that this per se constituted an act of negligence.

Pedestrian

It would appear that the only vital difference between the position of the pedestrian and the driver of a vehicle is that the former can stop at the very last moment and so avoid a collision, which will usually mean that

if he does not do so, his negligence is the (sole) proximate cause of his injury. This seems to be the true explanation of the dictum of Lord Cairns in *Dublin Railway v. Slatterly*, 3 A.C. at 1166, cited in *Mancho's* case, 1928 A.D. at 108. In *Van der Merwe's* case, 1934 A.D. 129, an unsuccessful attempt was made to apply the dictum to a cyclist astride of a motor cycle with the engine not running. Therefore, where a pedestrian, who was well acquainted with the conditions of a level crossing, had miscalculated the distance between himself and a train coming round a bend and passing over a level crossing where he was standing, it was held that, although the crossing was not properly illuminated, a **diligens paterfamilias** would not have anticipated that a pedestrian would stand too close (i.e. only 2 feet) from the railway-line in disregard of his own safety and that it was not necessary to provide a light to guard against this danger. This being so, the judgment of the court below in favour of the pedestrian was set aside and altered to one of absolution from the instance (*S.A.R. & H. v. Reed*, 1965 (3) S.A. 439 (A.D.)).

Passenger

A passenger in a vehicle is not so 'identified' with the driver of a vehicle, so as to make the negligence of the latter imputable to him (see *ante*, p. 75). But is there any duty on such passenger himself to take precautions against collisions at level crossings? In *Danoher v. S.A.R.*, 1932 E.D.L. 251, Graham J.P. said:

'I am not prepared to hold that a passenger could never be charged with the duty of keeping a look-out . . . but to lay down a general rule that, in all cases, a passenger having no control of the car has the same duty in this respect as the driver would, I think, lead to an absurdity and create additional dangers.'

In *British Columbia Electric Railway v. Loach* [1916] 1 A.C. 719, a level-crossing case, it was apparently conceded by counsel that the passenger owed a duty, and the judgment of the Privy Council proceeds throughout on that assumption. This Graham J.P. explains as probably a case of 'joint enterprise, in which both had control of the slow-moving vehicle' (a horse-drawn trolley). The true rule in respect of fast-moving vehicles is probably that there is no duty on the passenger to maintain an active look-out, but that there is a duty, if a dangerous situation is about to arise, to draw the driver's attention to it.

Illustrative cases

In most recent decisions the action is by a dependant or third party, in which the negligence of the driver of the vehicle is no bar to recovery—these cases will be found below in the section dealing with the duty of the Administration.

In *Jacobs v. Union Govt.*, 1919 A.D. 325, where at an open crossing the plaintiff failed to see the train, his action failed. cf. *Jordaan's* case, 1909 T.S. 465; *Otto's* case, 1915 C.P.D. 678; *Worthington's* case, 1905 T.H. 149; *Forde's* case, 1913 A.D. 473.

In *S.A.R. v. Hall*, 1929 T.P.D. 936, plaintiff said that the sun was in his eyes. Held, that this did not excuse his conduct in going on to the line. Per Tindall J.:

'The plaintiff is in no better position than if he had not looked at all. Realizing that though he looked he could not see, he ought either to have shaded his eyes until he did get a proper view, or else he should have stopped and listened carefully.'

In *R. v. Lombard*, 1936 T.P.D. 89, accused was charged with culpable homicide in respect of the death of a passenger in her car. She allowed one train to pass the crossing and then went upon it, assuming that the line was clear. A second train going in the same direction as the first ran into the car. The conviction was upheld; the crossing being an open one, so that a glance would have revealed the presence of the second train.

In *Union Govt. v. Buur*, 1914 A.D. 273, plaintiff allowed an up-train to pass, and then drove his horse-drawn wagon on to the line, where he was hit by a down-train. Held, that he could not recover. Innes C.J. dissented on the facts, holding that the cause of the accident was a depression in the road made by the Administration, which prevented free manoeuvre by the plaintiff; but (at 287) recognized the duty on plaintiff to make sure that a down-train was not masked by the up-train.

Geldenhuys v. S.A.R. & H., 1964 (2) S.A. 230 (C): Where the driver of an electric train departing from a station after dark had failed to put his headlight on bright immediately before putting the train in motion where there was a level crossing in the close vicinity ahead of him, it was held that he had failed to give proper visual warning of his approach.

Celliers v. S.A.R. & H., 1961 (2) S.A. 131 (T): Where the level crossing is in a built-up area, a train which claims a preferent right of way must give adequate warning. The driver must keep a good look-out and be in a position to apply his brakes if necessary.

Cason v. S.A.R. & H., 1966 (1) S.A. 842 (A.D.): Where the topography of the approaches to a crossing are such that the view of a crossing is obstructed or the circumstances being such that a whistle is barely audible, resulting in the warning to the eye and the ear being ineffective it is the duty of the Administration to adopt other measures in order to ensure a safe crossing.

S.A.R. & H. v. Orford, 1963 (1) S.A. 672 (A.D.): Where a crossing had winking lights, but the train approached without whistling or without its headlights on bright and where the winking lights had previously been on without any train making its appearance, the Court, on appeal, altered the judgment in favour of respondent from 25 per cent to 33½ per cent.

(4) DUTY OF ENGINE-DRIVER

The duty of the Administration towards road traffic may be treated under two heads: the duty as to speed, warning, look-out, and braking, and the duty in respect of the condition of the crossing.

Speed, warning and look-out and applying brakes

The train has the preferent right at a crossing but, in exercising that preferent right, it must take reasonable precautions to ensure the safety of road-users. There is no obligation so to run trains that they can stop if a collision threatens: the obligation is so to operate them that road-users are given ample and adequate warning of their approach, and that such warning is not ineffective by reason of the speed of the train (*Mancho v. S.A.R.*, 1928 A.D. at 94; *Dyer v. S.A.R.*, 1933 A.D. at 19; *R. v. Bentley*, 1949 P.H., O. 29 (N)). Speed and warning are correlative; the adequacy of the warning will depend on the speed, and the speed must be regulated in relation to the warning. The duty of the driver to keep a look-out is, however, subordinate to the duty of the Railway Administration to give adequate warning of the approach of trains (*Celliers v. S.A.R. & H.*, 1961 (2) S.A. 131 (T) at 135-6). No distinction can be drawn in this regard between a public crossing and a private crossing (*Morrison v. S.A.R. & H.*, 1948 (3) S.A. 208 (T)). See, also, *Orford's* case, 1963 (1) S.A. 672 (A.D.).

(a) Speed

In open country there is probably no restriction, provided due warning by whistle is given, for there is no duty generally on an engine-driver to be able to pull up within the range of his vision (*Pretoria City Council v. S.A.R. & H.*, 1957 (4) S.A. 333 (T) at 338 and *De Vaal v. S.A.R. & H.*, 1965 (1) S.A. 402 (T) at 405). Consequently if, when going round a curve he sees that the line is clear, he cannot be expected to provide for the contingency that a road-user will suddenly walk on to the railway track (*R. v. Hutton*, 1955 (4) S.A. 357 (T)). But if he sees that there are welders on the line ahead, busy mending the rails and apparently unaware of his approach, he should pull up if he has time to do so (*R. v. Hey*, 1948 (4) S.A. 570 (C)) (see *post*, p. 475), and *Hutton's* case (*supra*) at 360). But in urban or built-up areas, or at screened or masked crossings, speed may have to be drastically controlled, what is a reasonable speed depending on the nature of the crossing and the means of warning adopted (see *Mancho's* case at 93). Thus in *Fortman v. S.A.R. & H.*, 1948 (3) S.A. 595 (N), it was held that it was negligence for the driver of a rail motor-lorry to drive at a speed greater than would admit of his pulling up, if necessary, short of a level crossing where he had not an adequate view of the approach thereto and if his hooter does not give an effective warning of his approach. Whilst engaged in shunting operations in a heavily built-up area therefore there would be a duty upon the engine-driver so to regulate his speed as to be enabled to stop when necessary (*Celliers's* case, 1961 (2) S.A. 131 (T)).

(b) Warning

The duty of the Railway Administration, at a level crossing, is quite definitely to give **sufficient, clear and unmistakable warning of the train's approach** thereto by appealing to both the ears and eyes of the road-user (*McRitchie's* case, 1918 N.P.D. at 323; *Stegman's* case, 1932 A.D. 318; *Dyer's* case, 1933 A.D. 10; *Bardeleben's* case, 1934 A.D. 473; *Van der Merwe's* case, 1934 A.D. 129; *Symington's* case, 1935 A.D. 37; *Van Vuuren's* case, 1936 A.D. 37; *S.A.R. & H. v. Reed*, 1965 (3) S.A. 439 (A.D.); *S.A.R. & H. v. Orford*, 1963 (1) S.A. 672 (A.D.), and *Hoffman v. S.A.R. & H.*, 1966 (1) S.A. 842 (A.D.), where at 851, the learned Judge said:

“Aan die ander kant is dit die plig van die masjinis om behoorlike waarskuwing van sy aankoms to gee en hierdie waarskuwing moet onmiskenbaar waarneembaar wees deur die oog en die oor van die motoris. Die aanvaarde waarskuwing vir die oog in die nag is die onverdoft skerp hooflig van die trein. Die waarskuwing vir die gehoor is die fluit van die trein en in die nag is dit die plig van die masjinis om van albei hierdie waarskuwingstekens gebruik te maak.”

The whistle: The warning, during the day, besides the usual notice board (which is really of no importance) is the blowing of the whistle which, except where the crossing is protected by booms, must be blown at such a distance from the crossing as to give slow-moving traffic time to pull up. The driver must also whistle again at a distance which will give fast-moving traffic, which may have been too far off to hear the first whistle, time to pull up. This second whistle must continue for an appreciable time to make sure that the driver of the approaching vehicle has heard it and will have ample time to avoid a collision. In addition, if the driver sees that traffic is approaching a crossing he must, if he has stopped whistling, whistle

again, and if any circumstances indicate that the traffic is not regardful of his warning, he must apply his brakes. In heavily built-up areas the sound of the whistle would not carry as well as in open country (*Celliers's* case, 1961 (2) S.A. 131 (T) at 136). See also *Walker v. Rhodesian Railways*, 1937 S.R. 62 at 73; *Mancho's* case, 1928 A.D. 89; *Stegman's* case, 1932 A.D. 318; *Van der Merwe's* case, 1934 A.D.; *Symington's* case, 1935 A.D. 37; *Van Vuuren's* case, 1928 N.P.D. 132; *De Beer's* case, 1936 A.D. 262, and *Smart's* case, 1928 N.P.D. 132.

The effect of these cases, as above summarized, is contained in the amended Railway regulation relating to whistling at level crossings, which provides that the driver shall whistle first at the whistling board or, if there be no board, at 400 yards from the crossing, and again at 125 yards, which **whistle shall continue until the head of the train is on the crossing**. This regulation does not impose an absolute duty in favour of the public, breach of which is *culpa*, and 'if it requires more care than the common law exacts, then the common law determines what is and what is not negligence' (per Wessels C.J. in *Bardeleben v. S.A.R.*, 1934 A.D. at 481). But such a regulation is of importance as indicating the view taken by the Administration of the driver's duty (*ibid.*), and if a plaintiff can show that it was not observed, he will no doubt have a useful weapon in his hand. It seems likely that at a perfectly open crossing, such a whistle would be sufficient, if no vehicle was seen; but that if either the road or the **crossing** was at all **masked**, a whistle up to about 20 yards would be insisted on. It may be observed that if the above regulation is properly carried out, it will only be in exceptional cases that any negligence will be established against the Administration in respect of inadequate warning in **rural areas**, though *De Beer's* case, 1936 A.D. 262 (summarized below), shows that such exceptional cases may occur. With regard to urban or built-up areas, the duty is then more onerous; whistling by itself will generally not be sufficient (*Mancho's* case, 1928 A.D. 89, and cf. per Wessels C.J. in *De Beer's* case at 270; see *Taylor v. S.A.R. & H.*, 1957 P.H., J. 20 (N)).

If the driver actually sees a vehicle or pedestrian approaching the crossing, he must give such extra warning as is possible, to make sure that the road-user knows of his approach (*Lee's* case, 1927 A.D. 202; *Van der Merwe's* case, 1934 A.D. 129; *Dyer's* case, 1933 A.D. at 18). And, so soon as he realizes, or should realize, that the warning is not being heeded, he should apply his brakes and attempt to stop (*Dyer's* case, at 20). It is in most cases the giving of the **extra warning** that is vital. If the driver, in conformity with the new regulation, is already whistling, there is little in this respect which he can do.

Stationary or slow-moving trucks

The cases cited above deal with the warning to be given of an approaching train. But where a train is allowed to remain stationary on a crossing, or moves very slowly across it, something more by way of warning will usually be required. In *Danoher's* case, 1932 E.D.L. 250, a line of low trucks in the course of shunting operations, was allowed to remain on the crossing, no precautions being taken to warn road-users. In spite of the fact that the crossing was illuminated by municipal lights, it was held that the Administration should have given some warning. Compare *Acutt & Worth-*

ington's case, 1935 N.P.D. 314. (See also *Celliers v. S.A.R. & H.*, 1961 (2) S.A. 131 (T) at 134)). In England it is apparently forbidden by statute to shunt across level crossings, but in South Africa there is no such statutory provision.

(c) Look-out

A train-driver must keep a good look-out, both over the actual line and over road approaches (*Morrison v. S.A.R. & H.*, 1948 (3) S.A. 208 (T)). 'His first duty is to look to the line' (*Dyer v. S.A.R.*, 1933 A.D. at 19):

'His first attention must be directed to the crossing and its immediate neighbourhood. He must, however, also keep in view the public road, and must look both to his right and his left to see whether there are vehicles approaching. In modern conditions it is essential that he should keep in view as much of the road which cuts the line as he possibly can. How far he ought to look and how long he ought to look at the more distant portions of the road depends on circumstances. . . . The nearer he approaches the crossing the more his attention must be fixed on the crossing.'

In this case, a van approached, at high speed, a crossing at which the presence of two cyclists and of adjacent buildings required the train-driver to concentrate his attention on the actual crossing; the Court refused to hold the train-driver negligent in not seeing the van at the earliest possible moment. Compare *Symington's case*, 1935 A.D. 37, where the facts were substantially similar. But where there are no such **distracting circumstances**, it is undoubtedly negligent of the driver not to see an approaching vehicle or pedestrian on the line (see, e.g., *Van der Merwe's case*, 1934 A.D. 129; *R. v. Hey*, 1948 (4) S.A. 570 (C)). The obligation to keep a proper look-out is, of course, shared between driver and fireman, each for his respective side. See *Walker v. Rhodesian Railways*, 1937 S.R. at 73, and *R. v. Hutton*, 1955 (4) S.A. 357 (T) at 360. The duty to keep a look-out is not one which can be **delegated** to another (*Bentley v. Eastern Province Cement Co.*, 1949 (4) S.A. 581 (E)). In this case the defendants during shunting operations delegated their duty to a Native on the foremost bogie of the train.

An engine-driver must, on approaching a curve in his track, look out to see that the line is clear. Once he rounds the curve and sees that the line is clear, he cannot expect that any person would place himself in a position of considerable danger by suddenly walking on the railway track ahead of him (*R. v. Hutton*, 1955 (4) S.A. 357 (T)).

(d) Applying Brakes

If the driver sees a vehicle or pedestrian actually on the crossing, or in the direct path of the train, he must obviously take the most stringent precautions. In *S.A.R. v. Van Vuuren*, 1936 A.D. 37, summarized below, Stratford J.A. said:

'If agitated and continuous whistling had no effect, he [the driver] should have applied his brakes. In any case, when he saw the deceased exposed to danger and showing no signs of moving from it, he should at once have retarded his speed. If speed is not to be regulated by what a driver sees, I can see no reason for the rule . . . that a driver should keep his eyes open and observe the conduct of others in his path.'

For, as was said in *Celliers's case*, 1961 (2) S.A. 131 (T) at 136: 'The more the driver of a train is in a position to retrieve the situation in an

emergency by appropriate action, the less effective need the warning to traffic be; the less he is able, the more the warning must be.'

As to the circumstances in which the driver is entitled to assume that his warning has been heard and will be obeyed, there is some difficulty. The general question of relying upon due care being exercised by others is discussed *ante* (p. 32). In *Jacob's* case, 1919 A.D. 325, it was held that the driver was justified in assuming, when he saw a cart pull up, that a horse-drawn bus which was approaching the crossing at a walk would also pull up. Per Kotzé J.A.:

'Each case must necessarily depend on its own facts.'

The duty to warn will probably always arise as soon as a vehicle or pedestrian is seen actually in motion towards the crossing; the duty to **apply brakes** only if the **warning is disregarded**.

The duty of the engine-driver in respect of other persons on the railway line was dealt with in *R. v. Hey*, 1948 (4) S.A. 570 (C). Here the appellant had been convicted of culpable homicide for running down a welder while the latter was bonding the steel tracks, and it was held that, having regard to the three methods in which the accused should have been (but was not) warned of welding operations, unless the court was satisfied that the deceased persons were actually on the line or so near to the line that the accused **saw** them there, that he had reason to anticipate that they were not seeing him and would not move away, and that when he saw them there he still had time to pull up his train to avoid an accident, the accused should have been given the benefit of the doubt.

This decision is, it is submitted, open to criticism in that the mere fact that the men were killed while working is sufficient proof in itself that they were actually on the line. The accused admitted seeing them there, and in view of this fact he ought to have (a) satisfied himself by whistling that they were aware of his approach, and (b) regulated his speed in anticipation of their not hearing his approaching engine; his conviction should have been sustained.

SUMMARY

Each case must necessarily depend upon its own particular circumstances and the court will, in general, have regard to the following facts and conditions in determining whether the warning of the approach of the train has been adequate:

(a) **Engine noise:** Where a steam-engine is proceeding up a steep gradient its own panting noise would be a factor to be considered in respect of the auditory warning and, conversely, the fact that it is running free-wheel downhill towards a crossing should decrease the sound of its approach and would impose a still greater obligation to whistle clearly and adequately (*Stegman's* case, 1932 A.D. 318). In this regard the fact that the train was drawn by an electric or a diesel engine would also be a factor to be considered.

(b) **Visibility:** In wide open country, such as in the Karoo, where the smoke of an approaching engine can be seen for miles away, the Administration's obligation to warn would be less than in a heavily wooded country or where the hills and curves conceal the sight of an approaching

train considerably (*Hoffman's case*, 1966 (1) S.A. 842 (A.D.) at 851), where Wessels J.A. said:

'Indien die topografie by die aanloop na die oorweg sodanig is dat die uitsig is dat 'n fluit moeilik hoorbaar is sodat daardeur die waarskuwing vir die oog en oor oneffektief gemaak word, rus daar 'n plig op die Administrasie om ander matreëls te tref om sodoende 'n veilige oorgang te verseker.'

See, also, *Celliers's case*, 1961 (2) S.A. 131 (T) at 136.

(c) The presence of a 'Halt' or 'Stop' sign is a factor to be considered but, as was said in *Hoffman's case* (*supra*) at 851, following *McRitchie's case*, no great importance need be attached to it.

(d) **Winking lights** at a crossing at night-time is another factor to be considered in determining the respective negligence of the parties, but this cannot be said to be decisive (*Orford's case*, 1963 (1) S.A. 672 (A.D.), for which see *post*, p. 479).

(e) The **headlights** of the engine at night-time. Since the Railways have accustomed the general public to expect to see the normal headlights of an approaching train, a strong *prima facie* case of negligence can be set up where such headlights are not shining, although the blinking lights of the crossing are functioning (*Orford's case* (*supra*) at 677), since such winkers may be functioning when the train is stationary some 800 yards away (*ibid.*). In this case the engine-driver also failed to whistle. (See also *Hoffman's case*, 1966 (1) S.A. 842 (A.D.), where the train's headlights were on dim, and not on bright. See also the *Pretoria City Council case*, 1957 (4) S.A. 333 (T) at 338, following *Matcheke's case*, 1948 (1) S.A. 295 (T)).

In *Geldenhuys v. S.A.R. & H.*, 1964 (2) S.A. 230 (C), the driver of an electric train, departing from a station after dark, had failed to put his headlights on bright immediately before putting the train in motion when there was a level crossing in the close vicinity ahead of him and it was held that this was a negligent omission on his part.

5. DUTY OF THE GUARD

The duty to look out and take care devolves not only on the driver but also on the guard (*R. v. Van Niekerk*, 1950 P.H., H. 29 (N)). In this case a travelling break-down crane was moved into a new position but was not secured either by brakes or by scotches. It was on an incline. When the engine came to couple up with the crane it gave it a bump which sent it running away until it crashed into a passenger train. Held, that the guard should have foreseen the risk inherent in this operation and was guilty of negligence.

Illustrative cases

Mancho v. S.A.R., 1928 A.D. 89: Action by dependants. Crossing in populous town, masked by buildings and stationary truck. Only warning, a short whistle a minute before engine reached the crossing. Held, inadequate. As to contributory negligence, deceased put off his guard by previous practice of warning by man with flag; held, on the special facts, no negligence.

S.A.R. v. Stegman, 1932 A.D. 318: Action by dependants. Neither driver nor fireman saw deceased's car approach; deceased evidently did not see train. Open crossing. Held, collision caused by negligence of Administration's servants and of deceased;

dependants entitled to damages. Compare *Van der Merwe's* case, 1934 A.D. 129, on substantially similar facts.

Dyer v. S.A.R., 1933 A.D. 10: Action by dependants of passenger in vehicle. Judgment of absolution upheld on appeal. Driver whistled at board, 450 yards, and again at about 100 yards; held, sufficient (Stratford J.A., dissenting). Cyclists at crossing, and adjacent buildings; held, driver not negligent in not seeing approach of the vehicle (at high speed) at earliest possible moment. On the latter point compare *Symington's* case, 1935 A.D. 37, where a finding by the trial court of negligence in failing to see the vehicle was upset on appeal, the Court holding that the driver in concentrating his attention on the cyclists for about a second longer than was necessary may have committed an error of judgment, but was not negligent.

S.A.R. v. Bardeleben, 1934 A.D. 473: Action by dependants. Crossing screened, giving engine-driver view from 90 yards of only 44 feet of the road. Held, driver not negligent in not seeing car until about one second after it became visible, when it was too late to do anything. No duty to keep his eye fixed upon the spot; duty also to look at the crossing itself. Driver whistled up to about 114 yards from crossing; held not negligent (Curlewis J.A. dissenting); decision of trial court upset on this point, judgment for Administration.

S.A.R. v. Van Vuuren, 1936 A.D. 37: Action by dependants. Railway employee wheeling a barrow along the line, continuously in danger from the approaching train. Engine-driver saw him at 130 yards, and later lost sight of him, but took no steps either to give special warning or to decrease speed. Held, negligence; deceased also negligent; dependants entitled to damages.

Trznadel v. British Transport Commission [1957] 3 All E.R. 196 (C.A.): Plaintiff was a member of a gang engaged in working daily on the railway track. He had been told not to walk along the track and knew that trains passed each other on the double track about every ten minutes. One day, before daylight, when the visibility was obscured by mist and rain, he saw another ganger step off the track about 100 yards ahead, and, realizing that a train was coming, stepped off the one track on to another on which an engine was approaching from behind, coasting down an incline. Owing possibly to the noise of the approaching train he failed to hear this engine. He could have stepped on to a part known as the cess which is the part away from the railway lines. Held, that there was no negligence on the part of the Transport Commission and no negligence on the part of the engine-driver in failing to see him or to stop in time or to whistle.

S.A.R. v. De Beer, 1936 A.D. 262: Action by dependants. Crossing very badly screened; acoustic phenomenon (reflection from hill-side) made whistle appear to come from false position or else rendered it inaudible; Administration had been warned of this by letters complaining of the danger. Held, whistle up to 25 yards insufficient. Judgment for dependants. No precise indication of additional precaution; Wessels C.J. speaks of an overhead bridge, bells, red lights, as possibilities.

S.A.R. v. Acutt & Worthington, 1935 N.P.D. 314: Action for damage to a car driven by a third party on his own business. Car collided at night with goods train, which was travelling slowly over the road, the engine being already well across. Held, Administration negligent in giving no proper warning of its presence (the one short whistle having been given some time previously). But held, driver of the car negligent, his negligence (the sole) proximate cause, plaintiffs not entitled to recover. Compare *Danoher v. S.A.R.*, 1932 E.D.L. 251, where it was held that the plaintiff was not negligent, since (a) the trucks being low and flat were specially difficult to see, and (b) the plaintiff was put off his guard by a flash from the engine (off the crossing to his right) which diverted his attention from the road at the vital moment.

Hoffman v. S.A.R. & H., 1966 (1) S.A. 842 (A.D.): The duty of the motorist who intends to cross a level crossing is to look and listen and, in the event of his view being obstructed, or circumstances which might hinder his hearing, he should either drive slowly so that he can pull up immediately or stop when a train approaches. On the other hand it is the duty of the train-driver to give unmistakable and perceptible warning to the eye and ear of the motorist. At night-time he should have his headlight on bright, and not on dim. Held, that plaintiff was entitled to 50 per cent of his damages, and his passenger, Cason, to his full damages.

(6) LEVEL CROSSINGS

(a) Maintenance

The Administration is under an obligation to see that no direct danger is imposed on road-users by the condition of the crossing. In *Du Plessis v. S.A.R.*, 1930 T.P.D. 50, it was held to be negligent to allow a guard rail, within 4 feet of the actual metalled road-track over the crossing, to project to a height of 4 inches; and where a wagon, while caught on the obstruction, was run into by a train, the owner of the wagon recovered damages for its destruction, a plea of contributory negligence being rejected. In *Kirsten's* case, 1933 E.D.L., unreported, it was held to be negligence, at a crossing where the road crossed the line at an acute angle, to allow the rail to project about 2 inches; and plaintiff, the steel-shod wheels of whose cart caught in the rail and overturned, was awarded damages. In *Toomb's* case, 1908 T.S. 1057, a check-rail was held not to be a danger to pedestrians. *Paterson's* case, 1931 C.P.D. 289, touches a slightly different point; in that case it was held to be negligent towards railway employees to have an open culvert at a spot where shunting operations were conducted in the dark.

There is also a duty not to cause indirect danger by the condition of the crossing. If by reason of grass, shrubs, or other **obstructions upon railway property**, **visibility** is rendered **more difficult** for the road-user, this will be an element in the question whether the Administration has been guilty of negligence (see *Lock's* case, 1919 E.D.L. 212; *Visser v. S.A.R. & H.*, 1953 (2) P.H., O. 13 (O)). This duty is correlated with that of giving due warning; the condition of the crossing will frequently determine whether a particular warning was or was not sufficient.

(b) Gates

There was no statutory duty to maintain gates at level crossings (*Mancho's* case, 1928 A.D. at 94); so that a failure to provide gates was not in itself negligence (*ibid.*); but for the present-day situation see the Fencing Act, No. 31 of 1963 (*ante* p. 465). Nor can other particular forms of warning be insisted on; the duty is to provide due and adequate warning. The fact that gates are present, but are left open, will in general not justify a road-user from going upon the crossing without making sure that no train is approaching (*McRitchie's* case, 1918 N.P.D. 311, and cf. *Buur's* case, 1914 A.D. 273; *Buchanan's* case, 1915 N.P.D. 95); but in a particular case a plaintiff may perhaps be able to bring himself within the doctrine of *Mancho's* case (see above, at p. 476).

(c) Flagman

Where the crossing is a **private** one over a public road, the legislatures of the various provinces have stipulated for the employment of a flagman, as follows:

124. (1) Whenever rails laid across any public road are used for the purposes of any privately-owned locomotive or other privately-owned vehicle running on rails, whether drawn or propelled, no person driving or being in charge of such locomotive or vehicle shall cause or allow such locomotive or vehicle to cross such public road unless he has given sufficient warning to users of such roadway of the intention to drive, draw or propel the locomotive or vehicle across such road.

(2) No person driving or being in charge of any locomotive or vehicle referred to in subsection (1), shall cause or allow it to be stopped on a public road in such a manner as to obstruct or hinder traffic on such road.

Although there is a flagman, the engine-driver must still keep a good look-out (*Taylor v. S.A.R. & H.*, 1957 P.H., J. 20 (N)). Again in *Celliers v. S.A.R. & H.*, 1961 (2) S.A. 131 (T) at 140, it was held that the red lamps held by two railway servants did not convey any real warning beyond 60 yards from the railway line, especially as the neon red lights in the vicinity have interfered with the warning effect of such lamps.

(d) Illumination of Crossings

Unless it can be established that a *diligens paterfamilias* would have foreseen that the absence of illumination of a railway-crossing might result in harm, the Railways will not be liable for injury to a pedestrian who stands too close to the railway-lines upon the approach of a train at night-time (*S.A.R. & H. v. Reed*, 1965 (3) S.A. 439 (A.D.)).

(e) Flashing lights

Where it had been customary for seven years to warn traffic at a railway crossing of the approach of trains by means of flashing lights and it was found that, at the time of the collision, such flashing lights had failed to function at the crossing, which fact was known to the signalman who nevertheless failed to warn the driver of the train of such failure, and had, in fact, allowed the train to proceed, it was held that while the driver of the bus, which was damaged, had been negligent in relying solely on the flashing lights (and, therefore, in not keeping a proper look-out) the Administration's servants had also been negligent and that, therefore, a passenger injured by the collision was entitled to recover damages (*Barry v. S.A.R.*, 1941 A.D. 168).

Where the crossing is controlled by winking lights unaccompanied by bells, there is no appeal to the ear unless the train whistles. At night-time, moreover, the locomotive's headlight is, in effect, an established means of giving warning of the train's approach which travellers on the road have reasonably come to expect and consequently, the absence of any such warning is *prima facie* strong evidence of negligence (*S.A.R. & H. v. Orford*, 1963 (1) S.A. 672 (A.D.)).

(f) Change of warning precautions

Where the Railway Administration has chosen a particular form of warning for road-users at a level crossing as being the most effective, then although it may still order its servants to use the ordinary signs of warning, yet it induces the members of the public to rely on the principal warning signal. Absence of such warning therefore leads the road-user into a false sense of security and he is only disentitled from recovering damages if the defendant can show that a collision could have been avoided by the slightest care on his part (*Minister of Railways v. Meets*, 1953 (3) S.A. 615 (T)). In this case the level crossing in a busy built-up area was guarded by a signalman with a red light at night. The signalman had, however, retired to his cabin when plaintiff approached the crossing. The latter looked to his left and right, saw and heard nothing since the light of the engine was dim and

the engine had whistled when it was some distance away. Held, that the slight contributory negligence on plaintiff's part did not disentitle him to damages (*Mancho v. S.A.R.*, 1928 A.D. 89, followed).

(7) RAILWAY YARDS

Where the Railway Administration had agreed to allow consignees to send their lorries to the railway yard in order to remove and take goods from trucks standing in the yard, it was held that it was negligence on the part of the Administration to allow a 'loose' truck (i.e. kicked off by an engine) to proceed without care to the vehicles of the consignees (*Cardoso v. S.A.R. & H.*, 1950 (1) S.A. 773 (W)). In this case the argument that people using the yard must do so at their own risk was advanced but was specifically discarded by the court.

Shunting operations

Shunters are entitled to assume that persons using the railway yard will take proper precautions for their own safety and will not encroach on the track except perhaps after having made certain that no truck is about to be shunted on to the track. A shunter should, however, keep a **proper look-out**, and if he actually sees an obstruction on the track, or about to cross it, he must do what he can to avoid the accident; but he need not carry out his duties on the assumption that users of a shunting yard will recklessly expose themselves or their property to danger (*Sand & Co. v. S.A.R.*, 1948 (1) S.A. 230 (W)).

Both the shunter and the guard in charge of shunting operations must exercise care (*R. v. Van Niekerk*, 1950 P.H., H. 29 (N)).

Again where a Native was killed loading a railway truck, owing to the train starting without warning, it was held that the guard who had been directing shunting operations had been rightly convicted of culpable homicide (*R. v. Morrison*, 1949 (2) S.A. 924 (N)).

(8) PRACTICE

The Railway Administration is to be sued in the name of 'The South African Railways and Harbours' (Act No. 70 of 1957, section 65). Process may be served on the General Manager, or on the System Manager in the province in which proceedings are brought.

In terms of Act No. 70 of 1957, section 64 no legal proceedings may be brought against the Administration unless they be commenced within twelve months after the cause of such proceedings arose. Moreover no legal proceedings shall be commenced against the Administration until one month at least after written notice of intention to commence such proceedings has been served upon the Administration by the claimant or his attorney or agent. In that notice the cause of such proceedings must be clearly and explicitly stated.

A plaintiff must allege and prove that he has given notice in terms of section 64 and that he has acted within the time limit prescribed by this section. The only way in which that can be circumvented is to apply to the court for condonation in terms of subsection (3) of section 64 by showing that the Administration is in no way prejudiced by reason of his failure to lodge such claim within the period prescribed or that, having regard to the

circumstances, the claimant could not reasonably have been expected to have lodged such claim within the required period (*Evert v. Minister for Railways*, 1960 (3) S.A. 841 (T)). The time runs from the first day after the cause of action arose (*Versveld v. S.A.R.*, 1937 C.P.D. 55), i.e. when he suffered the damage complained of and not for a subsequent disability suffered as a result (i.e. epilepsy) (*Coetzee v. S.A.R. & H.*, 1934 C.P.D. 221), unless the defendant is estopped from raising the defence of statutory prescription (*ibid.*). (See also *post*, p. 517.)

CHAPTER XXIII

CONTRIBUTORY NEGLIGENCE (FAULT) IN COLLISION CASES AND APPORTIONMENT

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(a) IN CIVIL CASES

The general problem of contributory negligence, of the negligence of a third person, and of the effect of one or other upon the right of the plaintiff to recover his damages, has been dealt with *ante*, pp. 65-73. It was there observed that, on a plea of contributory negligence, the question of whether, given that both parties were negligent, either had the last opportunity at the critical stage, by exercising due care, of avoiding the accident, has been made non-applicable by the Apportionment of Damages Act, for now the doctrine of 'last opportunity' is obsolete in so far as it defeated plaintiff's claim for recompense altogether (*Jones v. Livox* [1952] 2 Q.B. 608 (C.A.) at 615 and *ante*, p. 65). This principle would however still apply in Rhodesia, which has no Apportionment of Damages Act. When the negligence of a **third party** is relevant, it is a defence only if such negligence was by itself the **sole proximate** cause; if it merely operated jointly with that of the defendant it is no defence; unless upon some legal ground (of which the only one is probably the relation of master and servant) the negligence of the third party is to be imputed to the plaintiff (*ante*, p. 66). Passengers, spouses and dependants are not 'identified' with the driver of a vehicle; the negligence of the latter is not imputed to them; he is a 'third party' to them within this rule (*ante*, p. 75).

In the present chapter it is proposed to discuss only certain aspects of these general principles which have peculiar application to running-down cases and collisions. It must, however, be borne in mind that much of the law on this topic has, today, only a very limited application by reason of the Apportionment of Damages Act, but there are nevertheless certain aspects to be considered in assessing the relative quantum of damages to be awarded to the parties who have both been negligent in varying degrees.

ROAD COLLISIONS

In *S.A.R. v. Stegmann*, 1932 A.D. at 325, Wessels C.J. said that

‘when we are dealing with modern, very quick-moving traffic, though it is sometimes possible where the parties are successively negligent to determine which negligence was in the result the cause of the accident, in most such cases the last acts follow one another so closely in time and are so closely connected as to justify the view that the resulting damage was due to the negligence of both parties’ (operating jointly).

This dictum expresses a sufficiently obvious truth: that where an event occurs in the space of a few seconds, it is impossible with any justice to the parties to attempt, by reconstruction and calculation of speeds and distances, to discover which of them had a fractionally better opportunity than the other of avoiding the accident to which the fault of both contributed. Nevertheless, the courts may, for the purpose of apportioning damages, investigate and ascertain whether or not there was a **critical stage** in the events leading up to the collision to the extent of deeming one party **more culpable** than another (cf. *Sutherland v. Banwell*, 1938 A.D. at 485). Therefore, where a collision occurs between two motor-cars and both the plaintiff and the defendant have been negligent, but the plaintiff has ceased to be negligent at a certain stage in the occurrence, he might be awarded a greater percentage of damages than that awarded to defendant if he discharges the onus of proving that, at that stage of the occurrence, the defendant could, by the exercise of reasonable care, have avoided the collision (cf. *Franco v. Klug*, 1940 A.D. 126).

Among factors which may operate so to distinguish between the conduct of the two parties are the following:

(a) *The element of sudden emergency.* This is discussed *ante*, p. 314. This may excuse conduct of either party which otherwise would be negligent.

(b) *The element of conscious appreciation of the danger.* This is discussed in the general discussion of contributory negligence (*ante*, p. 65). *Jackson Bros. v. Mortlock* (digested below) seems to be an application of this principle: so does *Sapsford’s Guardian v. Oberholzer*.

(c) *The fact that one party had the right of way.* Cf. *De Kock v. Silva and Viljoen v. Meiring* (digested below) (*ante*, p. 361–3).

(d) *The fact that one road was a side-road.* See, for example, *Ulrich v. Pepler & Co.* (*ante*, p. 365). In respect of **equal roads**, the remarks of Hathorn J. in *Murray v. Britz*, 1933 N.P.D. 352, undoubtedly have great force: in such cases ‘the burden of proving that the defendant’s negligence is the proximate cause is, in practice, so heavy that it is seldom if ever discharged’; nevertheless it may be discharged by reason of one of the above-mentioned factors. (See *ante*, p. 366.)

Of course, if one party at the critical stage **does all he can to avoid the accident**, while the other neglects to perform some act which would have avoided it, then by the general rule the latter is manifestly more to blame (see, e.g., *Leppan v. Grahamstown Municipality*, 1930 E.D.L. 396).

Illustrative cases

Jackson Bros. v. Mortlock, 1934 C.P.D. 281: Plaintiff approaching a cross-road did not see a car on the side-road until it was 5 yards off. He should have seen it at 15 yards.

Held, he was negligent. The defendant's driver entered the intersection at high speed; he saw plaintiff, thought he could get across in front, and accelerated to get past. Held, that as he had the last opportunity of avoiding the collision, his negligence alone was the proximate cause.

Sapsford's Guardian v. Oberholzer, 1933 O.P.D. 239: Plaintiff drove across an intersection. Having seen defendant's car to his side, he looked away. Held, he had been negligent. Defendant, seeing plaintiff and realizing that he was continuing on a straight course, nevertheless attempted to cross in front, being then on his (defendant's) wrong side of the road. Held, his negligence alone was the proximate cause.

De Kock v. Silva, 1934 T.P.D. 150: Plaintiff entered an intersection first. Held, he had a right of priority which he was entitled to exercise with due regard to circumstances and with reasonable care. He saw defendant but, had defendant kept his proper course, no collision would have occurred. Defendant did not see plaintiff and his course across the intersection took him on to his wrong side. Held, plaintiff was entitled to assume defendant would keep to his proper side and that there was no contributory negligence. See also *Viljoen v. Meiring*, 1936 C.P.D. 168, where plaintiff saw the other car at a distance of some 40 yards; per Sutton J.: 'I think he was entitled to assume that he could safely cross.' Held, that contributory negligence had not been established, onus being on defendant because plaintiff realized that a collision was imminent and did his best to avoid it; whereas defendant accelerated and went on to his wrong side. Contrast *Robinson Bros. v. Henderson*, 1928 A.D. 138. Here the plaintiff had entirely ignored defendant after seeing his approach. In this type of case, the first question is whether the one party exercised his right of way with due regard to circumstances and with reasonable care (if he did not he was negligent); the second question is whether, if he was negligent, the other party did not have the opportunity of avoiding the collision. Each case, as always, must depend on its own facts.

Ulrich v. Pepler & Co., 1935 C.P.D. 46: Defendant did not stop at a 'stop street'. Plaintiff saw him at 12 yards; he braked and swerved left. Had he swerved to his right, he would probably have avoided him. Held, that the sudden emergency was caused solely by the defendant, and that the plaintiff was not negligent. Cf. *African Tobacco Manufacturers v. Inglis*, 1935 N.P.D. 66, which involved a turn round a robot.

Leppan v. Grahamstown Municipality, 1930 E.D.L. 396: Both plaintiff and defendant were on their incorrect sides at an intersection where plaintiff meant to turn to his right and defendant to his left. Plaintiff then attempted to get to his correct side; defendant turned still more to his wrong side. Held, that plaintiff's negligence had spent itself at the critical stage; defendant's was the last act of negligence. Judgment was granted for plaintiff. In *Schoeman v. Schoombee*, 1936 E.D.L. 91, plaintiff was negligent in cutting a corner, but thereafter did his best to get on to his proper side, whereas defendant on seeing him neither slowed nor got to his proper side.

In *Port Elizabeth Tramways v. McAuliffe*, 1934 E.D.L. 170, the plaintiff entered a main street and turned to her right on to central tram-tracks. She had seen a tram approaching from her left, some way off, but did not again look at it. The tram-driver saw the car, but did not slow down until too late. Held, that even if plaintiff was negligent (which doubted), the tram-driver's negligence was the sole proximate cause, since plaintiff, on making her turn, must lose sight of the tram.

In *Blaiberg v. Klynhans*, 1938 C.P.D. 312, the plaintiff was driving in a horse carriage without lights on an important road and, as he came to a place shadowed in the moonlight by the mountain, he was struck head-on by the defendant's car which was then on its correct side of the road. Here the Court held that the plaintiff should have drawn to the side of the road which was only 20 feet wide and stopped, and that his failure to do so, together with his failure to have lights on his carriage, was contributory negligence.

PEDESTRIAN CASES

It is now accepted law that for his own safety and welfare a pedestrian owes an equal duty with a motorist to exercise due care in walking in or crossing a street; and that he does not satisfy this duty by merely looking when he steps off the pavement and thereafter leaving it to the motorist to avoid him (*Ford v. Town Hall Bottle Store*, 1926 W.L.D. 214; *Sparks v.*

Benson, 1928 T.P.D. 38; *Trevor-Smith v. Walters*, 1928 N.P.D. 351). It would appear therefore that where both pedestrian and motorist have failed to see one another until too late, the pedestrian cannot recover damages in full, unless the circumstances are such that the motorist had adequate opportunity of avoiding the accident which the pedestrian did not. Such, in fact, was the decision in the three cases cited. But there are other decisions (which are dealt with *ante*, p. 405) which show that the courts may be reluctant to apply this principle to pedestrians with the same degree of rigour with which it would be applied to motorists (see especially *Pearce v. Taylor*, 1934 E.D.L. 193, and *Devlin v. Licht*, 1930 P.H., J. 17 (E)). What is the true principle?

It is submitted that the inquiry should properly be directed to the question whether the motorist in fact had any **better opportunity** than the pedestrian. In *Ford's* case, Greenberg J. expressed the view that the pedestrian would have a better opportunity than the motorist, where the former was **crossing** the street, because, presumably, he could stop dead and allow the car to pass. But this is at least doubtful. In most cases, where the motorist bears down upon the pedestrian, the latter cannot estimate precisely either the speed or the course of the car (the car may swerve right or left); whereas the motorist is in control of a vehicle which can be stopped or altered in its course with considerable freedom. This is particularly so at **night** when the lights of the car give no true indication of its course. This would appear to be the justification for the dictum of Scrutton L.J. in *Cooper v. Swadling* [1930] 1 K.B. at 406, quoted by Gutsche J. in *Devlin v. Licht*, that 'if a pedestrian steps into the road **without looking**, 50 yards in front of a car in broad daylight, obviously the driver of the car could by reasonable care avoid the result of his negligence. (*Cooper v. Swadling*, it may be remarked, was not a pedestrian case; it was overruled by the House of Lords [1931] A.C. 1.) In *McLean v. Bell*, 147 L.T. 262, the House of Lords upheld a judgment in favour of a pedestrian who crossed a road without looking and was run down by a car, **there being evidence that the motorist could have avoided the collision while the pedestrian could not**. It is submitted that this is the proper attitude. There is no presumption that a motorist who runs down a pedestrian, even in broad daylight on a straight road, is **solely** responsible. He will be responsible if, in the circumstances, he had opportunity of avoiding the accident which the pedestrian had not: which will be a question of fact in each case, but subject always to the operation of the rule that the onus of establishing contributory negligence is on the defendant. The leading case is now *Evans v. African Guarantee and Indemnity Co.*, 1950 (3) S.A. 497 (A.D.), where the decision of the court below was reversed on the facts and where the Court held that where, at 8 o'clock in the night, the motorist had sounded his hooter and the pedestrian had stopped and looked towards the approaching car when twenty yards away, but had thereafter lurched into the way of the approaching car, the motorist was not guilty of negligence, although he did not alter the speed or direction of his car.

Of course, where the pedestrian is not at fault at all (as in *Hulley v. Cox*, 1923 A.D. 234, where he was legitimately walking close to and parallel with the kerb), no difficulty arises.

COLLISIONS WITH TRAINS

Where the collision is between road-user and train, the more usual problem is not that of contributory negligence strictly so called, but of the negligence of a **third person**, since the result of the collision is usually **fatal**. This is not, however, invariably the case.

The negligence of the driver of the road-vehicle, in such cases, is almost inevitably *culpa* at the final stage of the occurrence, and consequently at least a part of the contributory cause. This is owing to the fact that the train cannot stop as easily as can the vehicle; hence any opportunity the driver of the train had must have been shared by the driver of the vehicle.

In fact, one might perhaps have thought that the negligence of the road-user would in most cases have been held to be the sole proximate cause, for the same reason, but the courts have not taken this view. In a series of cases beginning with *Lee's case*, 1927 A.D. 202, it has been held that a failure by the driver of the train to give **due warning** is an act of negligence in the critical stage, contemporaneous with the negligence of the road-user in failing to see or avoid the train. If the engine-driver should have seen the road-user in time to whistle and so warn him, and if, had he done so, this would have given the latter an opportunity to avoid the collision, then it is clear law that failure to give such warning is negligence in the final stage, and part of the contributory cause. Moreover, where the plaintiff's vehicle was a stationary obstruction on a railway line and where the driver was warned of the presence of such obstruction, then the court will hold that the train-driver's negligence was the effective cause of the collision (*Golden Arrow Bus Co. v. S.A.R. & H.*, 1947 P.H., J. 2 (C)).

Both in *Van der Merwe's case*, 1934 A.D. 129, and in *Van Vuuren's case*, 1936 A.D. 37, an attempt was made to persuade the court to take another view, the argument being that the vehicle could stop in a very short space; but the attempt failed. In these cases, at any rate, the court will not measure such opportunities with a microscope. But possibly, in the case of a **pedestrian**, unencumbered (as he was in *Van Vuuren's case*, with a barrow), the argument would succeed.

In cases where the plaintiff is a **dependant**, or a **passenger**, or for some other reason not affected with the negligence of the driver of the vehicle, the negligence of the driver is a defence only if it is solely the effective cause. Where the collision is with a rapidly moving train, in practice the question turns upon the negligence of the driver of the train; because, as already remarked, the negligence of the driver of the vehicle will almost *ex necessitate* be negligence in the critical stage. Examples of such cases will be found in the section on trains (*ante*, p. 465). Of course, there may be cases where the deceased was not negligent: *Mancho's case* (*ibid.*) is an example. But where the collision is with a stationary or slowly moving train, it may well happen that the negligence of the Administration does not come within the principle applied in *Lee's case* (above), since the driver of the train may then not be in a position to see the vehicle. Such a case is *Acutt & Worthington*, 1935 N.P.D. 314, where the driver of the train was already some 550 feet past the crossing when the collision occurred. There was no other railway servant at or near the crossing who could have seen and warned the driver of the vehicle. The latter therefore had the last opportunity; his negligence was solely the proximate cause; and the

plaintiff firm (though the driver was not their servant) was not entitled to recover against the Administration.

NEGLIGENCE AFTER IMPACT

Where the plaintiff may be barred from recovering damages because of his own contributory negligence he may yet be entitled to compensation if he can establish that the severity of injuries suffered by him was due, not to the impact itself, but to the negligence of the defendant in driving on after the impact (*Shearer v. Mayor of Dunedin* (1905) 24 N.Z.L.R. 193). This was the case of the meditating philosopher who through his own folly had been knocked down by a tramcar. Had the car stopped on impact he would have received only a trifling bruise, but as it had proceeded on, dragging the plaintiff underneath the car for a considerable distance, it was ruled that he was entitled to damages for the motorman's subsequent negligence. This principle is consistent with our own principle obliging a party to minimize damage. (See also *Samson v. Aitchison* [1912] A.C. 844, and Mazengarb, p. 132.)

(b) CRIMINAL CASES

Whereas in civil cases contributory negligence is always a pertinent question to be decided by the tribunal, the position in criminal cases is otherwise, for here the culpability of the complainant is mostly an irrelevant consideration since the sole matter at issue is: **was the accused negligent**? It may be that the plaintiff had been negligent—and he might on that account also be liable to be charged criminally—but that is a matter with which the court, with one exception, has no concern (*R. v. Clark*, 1924 N.P.D. at 350). **It is no defence, therefore, in a criminal action to show that the complainant was also culpable or blameworthy** (*R. v. Anthony*, 1932 W.L.D. 62). Per Gardiner J.P. in *R. v. Langton*, 1934 C.P.D. (J/C 446/34):

'In civil action a plea of contributory negligence may be a good answer on the part of the defendant even though he may have been negligent, but not in a criminal prosecution. If the accused's negligence has contributed to the accident, then, even though the complainant may have contributed by his negligence, the accused is nevertheless liable to a conviction. Take, for instance, a case of joint and simultaneous negligence. In a civil action, when an accident is brought about by the simultaneous negligence of both drivers, neither can recover from the other, but in a criminal prosecution, for **causing injury by negligence**, both drivers in these circumstances would be liable to conviction, provided, of course, **their negligence contributed** to the injury of one or the other (*R. v. Times*, 1941 E.D.L. at 43-4). If the accused can show, or if it appears, that the accused's negligence did not **contribute** to the accident, it may be that the accused is entitled to an acquittal, but the mere **fact that the complainant has been negligent** is not in itself a **sufficient defence**.'

The prosecution need merely show then that the **accused contributed towards the injuries** of the complainant (*R. v. Brown*, 1938 E.D.L. 20). See also *R. v. Times*, 1941 E.D.L. at 43-4; *R. v. Valpy*, 1937 P.H., O. 26 (C); *R. v. Sprenger*, 1920 E.D.L. 313; *R. v. Hurwitz*, 1929 C.P.D. 406; *R. v. Le Roux*, 1945 P.H., O. 3 (O); *R. v. Coleman*, 1940 T.P.D. (J/C 124/40), and *R. v. Sweidan*, 1939 E.D.L. 32.

This rule refers, of course, to charges of negligent driving *simpliciter*. In criminal trial for **culpable homicide**, or on a statutory charge of causing injury or damage by his negligence, however, the position is **different**, for

then the State must prove beyond a reasonable doubt that, not only was the **accused negligent**, but that his negligence was the **proximate** and efficient cause of the deceased's death or of the injury complained of (*R. v. Molife*, 1935 E.D.L. 252). In this connection the words of Lansdown J. in the case of *R. v. Freeman*, 1931 N.P.D. 460, are in point:

'If however it be found that the proximate cause of the disaster is not any such negligent conduct on the part of the motorist but absence of reasonable care on the part of the pedestrian, the motorist is freed from liability. Nor would the position be different if the negligence of the pedestrian, which is proved to be the proximate and efficient cause of the disaster, had been preceded by some negligence on the part of the motorist.'

This was followed in *R. v. Roopsingh*, 1956 (4) S.A. 509 (A.D.) at 516. See also *R. v. Stripp*, 1940 E.D.L. 29; *R. v. Anthonie*, 1929 O.P.D. 78, and *R. v. Kley*, 1947 P.H., O. 13 (O).

The accused is, therefore, not liable if the deceased had a good opportunity of avoiding the accused's negligence, but this last opportunity must have been an adequate one (*R. v. Marthinus*, 1953 P.H., O. 1 (O)).

Accordingly, while it is not necessary for the State to prove that the deceased was not the sole cause of his own death, yet if the evidence shows that he was, in fact, the sole cause of his death, the accused will be exonerated from blame (*R. v. Bates* (1942) S.A.L.J. 281).

Where death has been caused by another who has been performing a wrongful act, the acid test now is whether the consequence of death ought to have been foreseen by the wrongdoer since the doctrine of *versari in re illicita* no longer applies (*R. v. Church* [1965] 2 All E.R. 72 (C.A.); *S. v. Van der Mescht*, 1962 (1) S.A. 521 (A.D.) at 530 (death caused by mercurial gas in the process of illegally smelting down gold amalgam); *S. v. Bernardus*, 1965 (3) S.A. 287 (A.D.) at 290 (throwing a stick at A and killing B some four paces from A); *R. v. Gazembe*, 1965 (4) S.A. 208 (S.R.); *R. v. Nemashekwe*, 1967 (3) S.A. 520 (R., A.D.) at 522-3, and *R. v. John*, 1969 (2) S.A. 560 (R.A.D.))

In civil cases, furthermore, there must be some **damage** or injury to some person or property, but in criminal trials there exists no such necessary condition, for a person may be convicted of careless, negligent or reckless driving **whether anyone is hurt as a result or not**.

CHAPTER XXIV

PROOF AND PROCEDURE

SUMMARY

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1. PROOF

It is not proposed to deal fully with the question of proof and procedure in this work, such subject being one falling more properly within the scope of a treatise on the Law of Evidence, but certain aspects of particular interest to parties in collision cases may nevertheless be considered with advantage.

(a) RECONSTRUCTION

In appropriate cases the court should be on its guard to make some allowance for a mental process of reconstruction of the events in question on the part of witnesses. This is especially so where the collision concerned is one in which the witness is himself involved, or is specially interested, since not infrequently there is a natural and human tendency for him to reconstruct the facts or occurrences incorrectly by drawing inferences born of fleeting, and certainly not trustworthy, impressions at the time

of the accident. (See Schreiner J.A. in *Lambrechts v. African Guarantee & Indemnity Co.*, 1955 (3) S.A. 459 (A.D.) at 456.)

(b) ONUS OF PROOF

Ei incumbat probatio qui affirmat, non qui negat. The burden of proving an allegation is on the party making it.

In accordance with this fundamental rule, the onus of proving an issue in a case lies throughout upon the party who alleges it (*Van Staden v. May*, 1940 W.L.D. at 204). Using the phrase 'onus of proof' in this, the accurate sense, it does not shift throughout the course of a trial, notwithstanding the operation of inferences, presumptions, or other modes of proof. Where there is only **one issue** in a case, for example, where the negligence of the defendant alone is in issue, the onus is and remains throughout on the **plaintiff** (*Freedman v. Harrismith Municipality*, 1945 O.P.D. 212). Where there are **several issues**, for example where negligence on the part of the plaintiff is pleaded, or *volenti non fit injuria*, or *vis major*, then the onus may be said to **shift** during the course of the case (*Frenkel v. Ohlsson's Breweries*, 1909 T.S. 957); though even here the onus in respect of **each issue** remains on the party alleging it. Accordingly, in a case where the issue of contributory 'fault' has been put in issue, the onus of proving the defendant's negligence lies upon the plaintiff and, unless he discharges it, he must fail in his action. If, however, defendant's negligence is established, then the onus then lies upon the defendant of establishing his allegation of the plaintiff's own negligence. The same rule applies with other special defences. The onus of proving that the collision was due to the act of a third party is certainly on the defendant to give an explanation which the court can accept (cf. *Khan v. Texas Co.*, 1942 C.P.D. 213).

This contention has found support in *Pillay v. Krishna*, 1946 A.D. at 953, where Davis A.J.A. pointed out that actually there are three concepts of onus, namely:

- (1) The full onus which lies initially on one of the parties to prove **his** case;
- (2) the quite different full onus which lies on the other party to prove **his** case on a quite different issue, and
- (3) the duty of both parties in turn to combat by evidence any *prima facie* case so far made out by his opponent. This duty alone, unlike a true onus, **shifts** or is transferred.

The rule as to onus, it should be noted, 'is not a rule to enable a jury (or judge) to decide upon the merits of conflicting evidence' (per Bowen L.J. in *Abrath v. N.E. Railway Co.*, quoted in *Frenkel's* case at 962). The court, independently of the question of onus, must make up its mind whether, on the evidence, a particular issue has or has not been established. But where the effect of the evidence, fairly and carefully weighed, is to leave an issue in doubt, then the question of onus is all-important; because then the party must fail on whom lay the onus of establishing that issue. See, also, *Bee v. Railway Passenger Ass. Co.*, 1947 (4) S.A. 356 (N).

Preponderance of proof and absolution. In all civil trials it must be borne in mind that the onus of establishing negligence is always on the plaintiff and if the court is unable, upon a preponderance of probabilities, to find negligence on the part of either the defendant or the plaintiff, then the

only course is to grant absolution from the instance. (*Eversmeyer (Pty.) Ltd. v. Walker and another*, 1963 (3) S.A. 384 (T)). (See *post*, p. 493.)

Insurance cases. Where an insurance company repudiates a claim on the ground that liability would not accrue to it if the insured person were under the influence of alcohol, it has been ruled that, in terms of the agreement of insurance, the onus rests on the plaintiff to establish that the risk insured against has eventuated; thereafter the onus shifts to the defendant company to prove that the insured's death was contributed to by reason of his being intoxicated (*Agiakatsikas v. Rotterdam Insurance Co., Ltd.*, 1959 (4) S.A. 726 (C)). Much depends upon whether the terms of the contract constitute a 'promise with exceptions' or a 'qualified promise'. If it is a 'promise with exceptions' the onus would be on the defendant company, but if it is a 'qualified promise', in the sense of being definitive of the risk assumed by the company, the onus would rest on the plaintiff to prove that he or the deceased, was not intoxicated at the time in question (*ibid.*, at 728). See also *Eagle Star Insurance Co., Ltd. v. Willey*, 1956 (1) S.A. 330 (A.D.), and *Griessel N.O. v. S.A. Myn en Algemene Assuransie (Edms.) Bpk.*, 1952 (4) S.A. 473 (T).

(c) THE PRIMA FACIE CASE

There is, however, another sense in which the phrase 'onus of proof' is sometimes used. It is sometimes said that when the plaintiff establishes a 'prima facie case', or produces 'prima facie proof' of an issue, the onus then lies upon the defendant to rebut it (*Khan v. Texas Co. (supra)*). But this usage is undesirable (see *R. v. Kumalo*, 1930 A.D. at 212; *Udal & Robinson v. Witfontein Fruit Farms*, 1922 A.D. at 136; *Van Wyk v. Lewis*, 1924 A.D. at 445), the true position being that the onus remains throughout on the plaintiff, but that he may produce evidence which discharges that onus unless it is met. He may, as the phrase goes, establish a prima facie case which calls for an answer from the defendant.

Where the plaintiff so establishes a prima facie case, to which the defendant furnishes no answer, or an unsatisfactory answer, then the prima facie case **may**, and in the great majority of cases will, become conclusive, and judgment be entered for the plaintiff (*Salmons v. Jacoby*, 1939 A.D. 589). (See p. 501 for the facts.) From a literal reading of the dicta above cited (to which may be added *Ex parte Minister of Justice*, 1931 A.D. at 478-9, and *Goosen v. Stevenson*, 1932 T.P.D. at 226), it might be thought that the rule was, that judgment **must** be entered for the plaintiff. But it seems clear that this is not so. Where the defendant at the close of the plaintiff's case applies for **absolution**, the question before the court is not whether the evidence is such that the court **should** give judgment for the plaintiff: it is whether the evidence is such that the court **might reasonably** so give judgment. (*Bee v. Railway Passenger Assurance Co.*, 1947 (4) S.A. 356 (N) at 357-8.) If, then, the defendant closes his case without leading evidence, the question then is whether the court should give judgment for the plaintiff. These principles, which are well established in practice, are set forth in *Gascoyne v. Paul & Hunter*, 1917 T.P.D. at 172-3; it seems most improbable that the dicta cited therein were intended to disapprove of them. It is submitted that it is still the law that although absolution may be refused, judgment need not necessarily be entered for the plaintiff if the

defendant then closes his case; though in the great majority of cases no doubt this will ensue. See also *Erasmus v. Boss*, 1939 C.P.D. 207; *Bee v. Railway Passenger Assurance Co.*, 1947 (4) S.A. 356 (N), and *Eversmeyer (Pty.) Ltd. v. Walker and another*, 1963 (3) S.A. 484 (T).

Two Defendants. Where there are two defendants sued in the alternative and the one closes his case after leading some evidence and the other then applies for absolution from the instance, the position can be different and the court is entitled to refuse the application if there is some evidence upon which the court **might** find for the plaintiff (*Putter v. Provincial Insurance Co., Ltd. and another*, 1963 (4) S.A. 771 (W), applying *Hummerstone v. Leary and another* [1921] 2 K.B. 664).

Both Drivers Negligent. Where a collision took place on cross-roads of equal importance, both drivers were each on their right side of the road, and the driver of the car, in which plaintiff was an innocent passenger, was genuinely unable to trace the other driver, it was held that, since the defendant had closed his case without calling any evidence, both drivers were to blame and, accordingly, the plaintiff was entitled to recover full damages (*France v. Parkinson* [1954] 1 All E.R. 739 (C.A.)).

In criminal cases also it has been held that a failure to answer a prima facie case **may** convert such proof into proof beyond all reasonable doubt (*R. v. Koen*, 1937 A.D. 211, and *R. v. Ingram* (1938) S.A.L.J. 83).

(d) ANSWERING THE PRIMA FACIE CASE

Where a prima facie case of negligence has been established, then, subject to what has just been said, the defendant is called upon to meet, answer or rebut it. But he is not called upon to disprove negligence; since the onus on that issue remains with the plaintiff. If he produces evidence which leaves the issue in doubt, so that, acting upon the balance of probability rule, as stated below, the court cannot say that negligence has been affirmatively established; then the plaintiff must fail, and judgment at least of absolution should be entered. The common application of the rule is in cases where the prima facie case has been established by the operation of the maxim *res ipsa loquitur* (as in *De Wet v. Adams*, 1935 T.P.D. 247, and *Petersen v. Hartman*, 1935 E.D.L. 59); but it follows from general principle, and is not confined to such cases.

In *Khan v. Texas (S.A.) Ltd.*, 1942 C.P.D. 213, the defendant had collided with the plaintiff on the wrong side of the road. Held, that he had failed to discharge the onus lying on him of giving an explanation which the Court could accept as to how he came to be on his incorrect side of the road.

(e) AMNESIA

What is the position if the defendant does elect to give evidence, but states, and is believed, that owing to shock he has no recollection of the events, or of his conduct, immediately preceding the accident? It would appear that the position is not the same as if he had given no evidence at all. Otherwise, when a prima facie case is made out, if he **elects** to give **no evidence** then, in a case depending on negligence, the presumption will be very strong that his evidence, if it were given, would assist the plaintiff; the prima facie case not merely remains, but is strengthened (*Minister of*

Justice v. Seametso, 1963 (3) S.A. 530 (A.D.) at 535). But where he does give evidence, but **genuinely cannot explain**, this element is not present, and the fact that the possibility of its being present has been eliminated will probably, in practice, go to weaken the plaintiff's case. In other words, the court will more readily infer negligence when it is a question of deciding whether an answer is called for from the defendant, than it will when it has been established that the defendant genuinely cannot give any answer. In *Minister of Justice v. Seametso (supra)*, the plaintiff, who had been struck on the head when walking towards defendant's car at night-time, was, owing to loss of memory, unable to give any evidence, but the Court held that, since the defendant had failed to call the driver of his car, the plaintiff was, on the facts of the case, entitled to his damages. (See also *Lambrechts v. African Guarantee and Indemnity Co., Ltd.*, 1955 (3) S.A. 459 (A.D.) at 467.) In *R. v. Whiley*, 1935 C.P.D. 466, defendant could give no explanation, but the facts from which negligence was inferred were so strong as to be sufficient even for a criminal case.

Since the decision in *Hamilton v. MacKinnon*, the courts have been prone to look somewhat askance at pleas of amnesia, and it has accordingly been ruled that a heavy onus lies upon a party in a collision case, who alleges that he is suffering from such loss of memory in consequence of an accident, to establish such fact (*Buckman v. S.A.R. & H.*, 1941 E.D.L. 341). Per Gutsche J.:

'Because this amnesia or *oblivio praeteritarum rerum post et propter calamitatem*, has become fashionable with both defendants and plaintiffs in collisions and running-down cases since the decision in *Hamilton v. MacKinnon* (see, e.g., *R. v. Apter*, 1941 O.P.D. 161) it has become more necessary than ever closely to scrutinize the evidence of the litigants who hold up such a convenient curtain which, in certain cases, may effectively screen their faulty actions at the critical time.'

Amnesia may in a criminal case be established by a balance of probabilities (*R. v. Du Plessis*, 1950 (1) S.A. 297 (O) at 305). In this case the defence was upheld.

(See also *Norman-Scoble on Evidence*, pp. 4-6.) *Hamilton v. MacKinnon*, 1935 A.D. 114, has been distinguished in practically every case which has followed it. (See *post* p. 500-1.)

(f) PREPONDERANCE OF PROBABILITY

In a criminal case, the charge must be proved beyond reasonable doubt, but in a civil case the court is entitled, in its discretion, to act upon a preponderance of probability (per Kotzé J.A. in *West Rand Estates v. New Zealand Insurance Co.*, 1925 A.D. at 263, applied in *Cape Coast Exploration Co. v. Scholtz*, 1933 A.D. at 75). (The dicta of Wessels C.J. in *Hamilton v. MacKinnon*, 1935 A.D. at 118, which might seem to tend the other way, cannot have been intended to throw doubt upon this well-established rule: see *De Wet v. Adams (supra)*; *Mitchell v. Maison Libson*, 1937 T.P.D. at 16.)

The **probability**, however, must be **strong**; it must not amount to a **mere conjecture or surmise**; it must be of sufficient force to raise a reasonable presumption in favour of the party who relies upon it (*ibid.*; *Pretoria Light Aircraft Co., Ltd. v. St. Lucia Estates (Pty.) Ltd.*, 1950 (2) S.A. 656 (N)). What, in a given case, will be sufficient to establish this strong pre-

ponderance of probability must depend entirely upon the facts of the case. Although previous decisions are of assistance, it has frequently been pointed out that where the issue is negligence, which depends upon all the circumstances of the particular case, cases decided upon different circumstances cannot be used except with great circumspection.

However evenly balanced the evidence of the contending parties may be, the trial judge must make some finding for the one side or the other if possible and it is not competent for him to reject both the claim and the counterclaim. He must come to some conclusion even to the extent of holding that both parties were to blame (*Bray and another v. Palmer* [1953] 2 All E.R. 1449 (C.A.), and *Eversmeyer (Pty.) Ltd. v. Walker and another*, 1963 (3) S.A. 384 (T)).

(g) FACTS PECULIARLY WITHIN DEFENDANT'S KNOWLEDGE

In deciding whether the plaintiff has established his case, and particularly in deciding whether he has established a *prima facie* case, it is clear that the court will be considerably influenced by the fact that certain matters in issue lie peculiarly within the knowledge of the defendant (*Galante v. Dickinson*, 1950 (2) S.A. 460 (A.D.) at 465). In *Ex parte Minister of Justice*, 1931 A.D. 466 at 479, Stratford J.A. says that whether the plaintiff has discharged the burden of proof 'depends upon the nature of the case and the relative ability of the parties to contribute evidence on that issue'. It is suggested by some authorities (e.g. Taylor, *Evidence*, para. 376a) that where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, but this is almost certainly inaccurate. In *Union Govt. v. Sykes*, 1913 A.D. 156, both Innes J. (at 173) and Solomon J. (at 179) disapprove of Taylor, but seem to approve the more guarded statement of Stephen that, 'in considering the amount of evidence necessary to shift the burden of proof, the Court has regard to the **opportunities** of knowledge which may be possessed by the parties respectively'. If he has such opportunity of knowledge, and fails to present evidence thereof, such failure may be regarded as a factor to be considered as strengthening or fortifying the other party's case (*Tarn v. London Assurance*, 1937 W.L.D. 149 at 152; *Sather v. Richman*, 1937 W.L.D. 39 at 40; *Sakin v. Koren*, 1950 (1) S.A. 495 (O) at 514; *Narotam v. Madhav and another*, 1965 (4) S.A. 85 (W) at 92; *Nelson v. Marich*, 1952 (1) S.A. 65 (T) at 70, and *Gulf Oil Co. v. Rembrandt Fabrikante en Handelaars, Edms., Bpk.*, 1963 (2) S.A. 10 (T) at 27-8). The principle has been applied to the question whether a car was being driven by the servant of a defendant (*Goosen v. Stevenson*, 1932 T.P.D. 223; *Gavin v. Seebrun*, 1935 N.P.D. 235); and there can be little doubt that in considering whether the maxim *res ipsa loquitur* is to be applied in a given case, the courts will be largely influenced by it.

(h) PROOF BY INFERENCE

The proof of negligence must necessarily in the majority of cases be a matter of inference. The courts not only may, but must, proceed by inference from proved facts, otherwise, except out of the mouth of the defendant himself, it is difficult to see how a case of negligence could be established. As to the facts from which negligence can properly be inferred

it is impossible to lay down a general rule, in any more explicit terms than those already used in the section on Preponderance of Probability (*supra*).

Per Lord Wright in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* [1939] 3 All E.R. at 733 (cited with approval in *R. v. Kleyn*, 1947 P.H., O. 13 (O)):

'Inference must be carefully distinguished from **conjecture** or **speculation**. There can be no inference unless there are objective **facts** from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts, from which the inference can be made, the inference fails and what is left is mere speculation or conjecture.'

This dictum was cited and followed with approval by Miller J. in *S. v. Naik*, 1969 (2) S.A. 231 (N) at 234, and the caution was also observed in *R. v. Laubscher*, 1952 P.H., O. 20 (C), where it was held that in a **criminal case** it is not sufficient that the inference is merely one which can reasonably be drawn.

Before an inference adverse to an accused may be drawn in a criminal case therefore there are two essential rules of logic which must be borne in mind:

- (a) the inference sought to be drawn must be consistent with all the proved facts. If not, that inference cannot be drawn, and
- (b) the proved facts must be such that they exclude every reasonable inference save the one sought to be drawn. If they do not exclude other reasonable inferences there must be a doubt whether the inference sought to be drawn is correct (*R. v. Blom*, 1939 A.D. 188 at 202).

Accordingly, as was said by Broome J. in *R. v. Jonas*, 1949 (2) S.A. 801 (N) at 803-4:

'The Court's duty is to look at the proved facts and to draw the proper inference from them and not to elaborate hypotheses without factual support.'

There is, however, one particular type of case in which the question of the drawing of the inference of negligence requires discussion; this is the type of case where it is sought to apply the maxim *res ipsa loquitur* (*post*, p. 496).

(i) MATHEMATICAL CONCLUSIONS ON SPEED-DISTANCE RATIO

It is not unusual for the parties to adduce evidence (usually in cross-examination) as to the approximate distance between the vehicles concerned in a collision, and also as to their approximate relative speeds, and then seek to draw conclusions of fact (usually adverse to the deponent) from the mathematical results thus obtained. This practice must be used with extreme caution, and at most it should be used only as corroboration of other evidence before the court. Thus in *Pierce v. Hau Mon*, 1944 A.D. 175, Watermeyer C.J. said:

'There is no reason for disbelieving this evidence and it must be recognized that mathematical calculations made for the purpose of testing it based on estimates of her speed (assumed to be uniform) can very easily lead to entirely erroneous results.'

Similarly, Ogilvie Thompson A.J. in *Van der Westhuizen v. S.A. Liberal Insurance Co.*, 1949 (3) S.A. 160 (C), said:

'In my opinion, however, the strictly mathematical approach, though undoubtedly very useful as a check, can but rarely be applied as an absolute test in collision cases, since any mathematical calculation so vitally depends on exact positions and speeds, whereas in truth these latter are merely estimates almost invariably made under circumstances wholly unfavourable to accuracy.'

And in *Beswick v. Crews*, 1965 (2) S.A. 690 (A.D.) at 693, the same judge said that estimates of distances (between vehicles) by witnesses are 'notoriously inaccurate'. See also *Stein v. Grove*, 1949 (3) S.A. 540 (T) at 543; *S.A.R. v. Symington*, 1935 A.D. at 45-6; *Heneke v. Royal Insurance Co.*, 1954 (4) S.A. 606 (A.D.) at 613.

Finally, Van den Heever J.A. in *S.A.N.T.A.M. v. Moolman*, 1952 P.H., O. 16 (A.D.), held that mathematical arguments as to the relative position of vehicles based on hypothetical data as to speed are worthless, and said:

'Ons is vergas op 'n rekenkundige vertoog omtrent die relatiewe bewegings en stand van die twee voertuie op verskillende tydstippe. Myns insiens was dit tydverkwisting. Dit het groteliks gesteun op 'n beweerde merk wat S se motor in die pad gemaak het. Die oorsprong van die merk is egter nie bewys nie. Dan steun die berekening verder op gissings omtrent snelheid uitgedruk in soveel per sekonde. Om die rekenkundige metode op rekbare gegewens toe te pas, is slegs om die ongewisse met die onbekende te vermenigvuldig.'

(j) RES IPSA LOQUITUR

(a) General

Where there is no direct evidence of negligence then the maxim of *res ipsa loquitur* is frequently applied. This is not a principle or doctrine of law, but is merely a convenient label which means no more than what it says, namely, that the facts speak for themselves (*Van Wyk v. Lewis*, 1924 A.D. 438 at 444; *Bee v. Railway Passengers Assurance Co.*, 1947 (4) S.A. 356 (N) at 358). In other words it is a cogent argument which the plaintiff can advance for the purpose of establishing a *prima facie* case that, in the circumstances the mere fact that an accident has occurred raises an inference of *culpa* on the defendant's part and the probability that he was negligent. How loudly, or how cogently such facts speak for themselves will, in every case, depend upon its own particular circumstances (*Bee's case* (*supra*) and *Paola v. Hughes (Pty.) Ltd.*, 1956 (2) S.A. 587 (N)).

The full concept of the maxim was clearly demonstrated in the dictum of Lord Shaw in *Ballard v. North British Railways Co.* (1923) 60 Sc.L.R. 451, which was quoted with approval by Millin J. in *Watt v. Van der Walt*, 1947 (2) S.A. 1216 (W) at 1221, as follows:

'(1) It is the expression in the form of a maxim of what in the affairs of life frequently strikes the mind, that is, that a thing tells its own story—not always, but sometimes; (2) but although a thing tells its own story, that is not necessarily the whole story. Accordingly (3) when the story would seem to be relevant . . . to infer liability for some occurrence out of the usual, the remainder of the story may displace the inference. But (4) if the remainder of the story does not do so, the inference remains—*res ipsa loquitur*.'

'No direct evidence': Being a presumption from the facts, there is no room for the invocation of the maxim when it is clear from the evidence what the negligence actually is (*Administrator, Natal v. Stanley Motors*,

Ltd., 1960 (1) S.A. 690 (A.D.) at 700–1), nor would the maxim apply at the close of the whole case when both parties have completed their evidence (*Klaassen v. Benjamin*, 1941 T.P.D. 80 at 87).

(b) *Maxim defined*

The classic statement of the type of case in which the courts will infer negligence from the mere happening of an accident is contained in the judgment of Erle C.J. in *Scott v. London & St. Catherine Docks* (1865) 3 H. & C. 596 at 601 that, ‘**where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management of it use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care**’ (*S.A.R. v. General Motors*, 1949 P.H., J. 3 (C)). It will be seen that this statement prescribes three requisites: (a) that the thing which does the damage be under the **management** of the defendant, (b) that the accident be such as **does not ordinarily happen** without negligence, and (c) that the defendant gives **no acceptable explanation** (*Arthur v. Bezuidenhout & Mieny*, 1962 (2) S.A. 566 (A.D.) at 573–6; *Crook v. Erasmus*, 1927 E.D.L. 142 at 147; *De Wet v. Adams*, 1935 T.P.D. 247 at 253–4; *Laurie v. Raglan Building* [1941] 3 All E.R. 332 (lorry mounting a pavement); *Fisher v. Coleman & Malga*, 1937 T.P.D. 261, and *De Bruyn v. Natal Oil Products*, 1952 (1) P.H., J. 1 (N)).

Both (a) and (b) are important. The maxim will seldom have any application unless, not merely the thing, but also ‘all the surrounding circumstances’, are wholly within the **defendant’s control** (see Halsbury, vol. 23, sec. 965, also Mr. Ian B. Murray’s treatment of the matter in (1936) *S.A.L.J.* 8). In general no doubt it will be restricted to an **isolated event**, as distinct from a sequence of events (per Beyers J.A., *Hamilton v. MacKinnon*, at 125), and to damage by an **inanimate thing**.

(c) *Application*

The maxim, where applicable, gives rise to an inference, rather than a presumption, for the court is not necessarily compelled to draw an inference of *culpa*. Where the inference arises the defendant must give evidence to counter it, i.e. he must tell the remainder of the story or take the risk of judgment being given against him. How far he need go in displacing the inference of negligence depends on the circumstances of each particular case (*Arthur v. Bezuidenhout & Mieny*, 1962 (2) S.A. 566 (A.D.) at 573–4). It follows that the use of the expression is only applicable when it is necessary to look solely at the incident concerned without the help of other evidence and only if the incident is viewed by itself and in its own light ought the expression to be used, otherwise the restricted meaning thereof might become confused (*Groenewald v. Auto Protection Insurance Co.*, *Ltd.*, 1965 (1) S.A. 184 (A.D.) at 187). Per Rumpff J.A.:

‘Ten slotte is dit wenslik om te beklemtoon dat die gebruik van die uitdrukking *res ipsa loquitur*, streng gesproke, alleen dan van pas is waneer dit nodig is om enkel en alleen na die betrokke gebeurtenis te kyk sonder die hulp van enige ander verduidelikende getuienis. Alleen as die gebeurtenis op sigself en in sy eie lig beskou word, behoort die uitdrukking gebesig te word omdat anders die beperkte betekenis daarvan vertroebel mag word.’

Thus where a chandelier fell and broke while a firm of electrical engineers was in the process of lowering it for the purpose of cleaning it, the maxim was applied (*Paola v. Hughes (Pty.) Ltd.*, 1956 (2) S.A. 587 (N)). Again where a motor-car fell from a crane sling while it was being loaded on to a ship, the inference of negligence was drawn (*S.A.R. & H. v. General Motors (S.A.) Ltd.*, 1949 (1) P.H., J. 3 (C)), and see also *Scott v. London & St. Catherine Docks (supra)*, where a person was injured by an article falling upon him from a ship's crane. Again where an unexplained explosion took place in the defendant's factory causing damage (*De Bruyn v. Natal Oil Products, Ltd.*, 1952 (1) P.H., J. 1 (C), and *Moore v. R. Fox & Sons* [1956] 1 All E.R. 182 (C.A.)). But where a deckchair, which plaintiff had hired and removed to another place, had collapsed, it was held that the maxim did not apply (*Durban Corporation v. Neugarten*, 1955 (1) P.H., J. 7 (N)). Where a motor-bus leaves the road and falls down an embankment, it is no defence to *res ipsa loquitur* that the event was due to a tyre burst since such tyre bursting may, or may not, be due to the negligence of the defendant (*Barkway v. South Wales Transport Co., Ltd.* [1948] 2 All E.R. 460 at 471 (C.A.)). See also cases digested *post*, pp. 501–2, and also articles in (1950) 67 *S.A.L.J.* 245; (1956) 73 *S.A.L.J.* 325, and (1962) 79 *S.A.L.J.* 257.

(d) *How inference is displaced*

Where, however, defendant does produce evidence, then if such evidence is believed, and it 'shows a way in which the accident may have occurred without negligence on his part', then 'the cogency of the fact of the accident by itself disappears, and plaintiff is left as he began, namely, that he has to show negligence'. but there is no actual onus on the defendant to establish his plea of inevitable accident (*Arthur v. Bezuidenhout & Mieny*, 1962 (2) S.A. 566 (A.D.) at 575–6). The explanation must however be a reasonable one; i.e. what is described by Beyers J.A. as 'n redelike, d.w.s. 'n praktiese uitleg'; see also the judgments in the *Ballard* case, quoted in *Hamilton v. MacKinnon* (at 358). It is therefore not sufficient merely to **suggest in argument** a reasonable theory accounting for the damage complained of without any negligence on the part of the defendant. On the contrary, if evidence is available it should be produced and such evidence should be to the effect that the accident may reasonably have been caused by some agency other than his own negligence (*Naude v. Boot & Shoe Manufacturers*, 1938 A.D. 379 at 392–3 and 398–9. See, also, *Boam v. Sydney Clow & Co.*, 1939 T.P.D. (J/C 34/39). *Rankisson & Son v. Springfield Omnibus Services (Pty.) Ltd.*, 1964 (1) S.A. 609 (D) at 616). Per Tindall J.A. in *Naude's* case:

'Admittedly the case was one where *res ipsa loquitur*. That consideration, however, does not throw on the defendants any onus of disproving negligence, but only a burden of giving a reasonable explanation of the accident. If the defendants gave an explanation which might reasonably be true and which, if true, would exculpate them from the charge of negligence, they must succeed unless the evidence as a whole showed a preponderance of probability against such explanation and in favour of the existence of the negligence alleged as would entitle the Court to hold that the plaintiff discharged the onus. . . . The mere suggestion of a reasonable theory according to which the accident may have happened without negligence cannot be a sufficient answer. It seems to me clear that where admittedly, as in the present case, the nature of the occurrence itself creates a probability of negligence,

it would be a negation of that premise if it were held that the defendant displaced the prima facie evidence by merely proving a reasonable possibility that the accident could have happened without negligence. Where the taking of a certain precaution by the defendant is the initial and essential factor in an explanation of the occurrence consistent with the absence of negligence and the evidence that such precaution was taken is accessible to him and not to the plaintiff, the prima facie evidence afforded by the occurrence is not displaced if the defendant's evidence goes no further than to show that that precaution may or may not have been taken. In my judgment the defendant must produce evidence sufficient to displace the inference that that precaution which was the very foundation of his explanation, was not taken.'

This was followed in *Jensen v. Williams Hunt & Clymer, Ltd.*, 1959 (4) S.A. 583 (O) at 587; *Arthur's case (supra)*; *Card v. Cagnacci*, 1964 (3) S.A. 652 (W) at 656.

The degree of persuasiveness required of the defendant will vary according to the probability or the improbability of his explanation (*Rankisson & Son v. Springfield Omnibus Services (Pty.) Ltd. (supra)* at 616), for his evidence is not to be considered in isolation from the rest of his evidence merely because, owing to death or some other cause, there is no room for contradiction (*Grootfontein Dairy v. Nel*, 1945 (2) P.H., O. 15 (A.D.). Per Schreiner J.A.:

'The question is not simply whether the explanation, taken by itself and assuming it to be true, shows how the accident might, not improbably, have happened without negligence on the part of the defendant. It remains necessary to consider the case as a whole including, on the one hand, the probabilities created by the plaintiff's evidence and, on the other, the effect of the defendant's explanatory evidence and then to ask oneself whether the plaintiff has shown a substantial balance of probability in favour of the view that the defendant was negligent and that his negligence, or in a defendant's action, at least contributed, to the accident.'

Compare the judgment of Solomon J. in *Colman v. Dunbar*, 1934 W.L.D. at 202 (reported on appeal, 1933 A.D. 141), and *ante*, p. 490. It is, of course, essential that the evidence given by the defendant should be **believed**; it must (to use the phrase from the *Ballard* case quoted in *Hamilton v. MacKinnon*, at 359) be 'true and sufficient': 'true', that is, credible, and 'sufficient', that is, a reasonable, practical explanation. See also *Watt v. Van der Walt*, 1947 (2) S.A. 1216.

(e) Possible but improbable explanations

Where the natural explanation of the accident is negligence in the defendant, but there are other possible explanations, then the court must decide upon the balance of probability (*Rankisson & Son v. Springfield Omnibus Services*, 1964 (1) S.A. 609 (D) at 615-16), having regard to the fact that the onus remains upon the plaintiff, and that the probability must be strong, something more than a mere conjecture or surmise is required (*Naude v. Transvaal Boot & Shoe Manufacturers*, 1938 A.D. at 380) since mere theories, or hypothetical suggestions will not avail the defendant (*Arthur v. Bezuidenhout & Mieny*, 1962 (2) S.A. 566 (A.D.) at 575), see above on Preponderance of Probability. A difficult question arises, however, as to whether, in order to establish a prima facie case, it is necessary for the plaintiff to negative such other possible explanations, or whether, if he establishes that the probable explanation was the defendant's negligence, it is then for the defendant to provide evidence showing that the accident may reasonably have occurred without fault on his part. To take a con-

crete case: If a motor-car suddenly swerves off the road and injures a pedestrian innocently standing there, must he, in order to establish a *prima facie* case, produce evidence to show that no mechanical defects were found in the car after the accident such as would explain the swerve? In *Botha v. Tunbridge*, 1933 E.D.L. at 100, the view was expressed that such a duty is incumbent on the plaintiff, but it is submitted that this opinion is unacceptable and savours of unreality (see *Naude's case (supra)*). Justice and fairness dictate that evidence explaining that such injury had occurred owing to a mechanical defect should be forthcoming from the defendant (see *Baumann's Products v. Porter*, 1934 C.P.D. 383; *McGowan v. Scott* (1923) 143 L.T. 217 and *Card v. Cagnacci*, 1964 (3) S.A. 652 (W) at 655). The question in every case is one of degree of probability. If the evidence for the plaintiff points strongly towards the negligence of the defendant, a *prima facie* case will be established, even though other **possible** explanations might be advanced (see per Davis J. in *Mitchell v. Maison Libson*, 1937 T.P.D. at 18); whereas if the most that can be said is that negligence in the defendant is a more likely explanation than others which not uncommonly produce similar accidents in everyday experience, then not even a *prima facie* case will be established. Where, as will usually be the case, the facts relating to the condition of the thing or vehicle lie **peculiarly within the knowledge** of the defendant, the courts, as remarked above, will more readily hold a *prima facie* case to have been established (*Paola v. Hughes*, 1956 (2) S.A. 587 (N)). (See *ante*, p. 494.)

In **criminal** cases if the accused, immediately after the accident, gave an explanation answering the inference of negligence and which **might reasonably be true**, it is incumbent on the prosecution to show that the explanation could not reasonably have been true (*R. v. Fourie*, 1950 P.H., O. 24 (N)).

(f) *In traffic cases*

It was at one time considered that the maxim of *res ipsa loquitur* would not apply to collisions in traffic cases (*Wing v. L.G.O.* [1909] 2 K.B. at 663, cited in *Bezuidenhout v. Berman*, 1929 O.P.D. 148 at 152, and the caution mentioned in *De Wet v. Adams*, 1935 T.P.D. 247 at 254), but there can be no doubt that in appropriate cases, and where the defendant is the sole operator or controller of the circumstances concerned, the maxim does now apply. See *Durban City Council v. S.A. Board Mills, Ltd.*, 1961 (3) S.A. 397 (A.D.) at 405; *Arthur's case (supra)* at 573; *Viljoen v. Cardoo Bros.*, 1925 C.P.D. 271 at 274 (horse suddenly swerving); *Van Wyk v. Lewis*, 1924 A.D. 438 at 445; *Klaassen v. Benjamin*, 1941 T.P.D. 80 at 87; *Fisher v. Coleman & Malga*, 1937 T.P.D. 261 at 266; *Sauerman v. Barnard*, 1958 (4) S.A. 149 (O). It has also been applied in criminal cases such as *R. v. Whiley*, 1935 C.P.D. 466; *R. v. Naidoo*, 1936 N.P.D. 439; *R. v. Rampertab*, 1939 N.P.D. 347; *R. v. Apter*, 1941 O.P.D. 161, and the cases cited below.

In *Hamilton v. MacKinnon*, 1935 A.D. 114, the defendant at night-time, on approaching a place where there was a curve in the road, proceeded straight on and, on mounting a ramp some 76 feet from where he left the road, caused the death of plaintiff's husband. The defendant's tyres were intact and his brakes were in order and the Court accepted his evidence

that he was suffering from loss of memory and it was ruled that the maxim of *res ipsa loquitur* did not apply. This decision has been distinguished and not followed in a large number of subsequent cases (see *De Wet v. Adams*, 1935 T.P.D. 247; *Mitchell v. Maison Libson*, 1937 T.P.D. 13; *R. v. Naidoo*, 1936 N.P.D. 439; *R. v. Whiley*, 1935 C.P.D. 466; *R. v. Koen*, 1937 A.D. 211; *Sauerman v. Barnard*, 1958 (4) S.A. 149 (O); *Naude v. Transvaal Boot and Shoe Manufacturing Co., Ltd.*, 1938 A.D. 379).

In answer to a *res ipsa loquitur* case, however, the defendant is not required to disprove negligence but merely to destroy the probability of negligence (*Durban Corporation v. Neugarten*, 1955 (1) P.H., J. 7 (N)).

Illustrative cases

(a) TRAFFIC CASES

R. v. Whiley, 1935 C.P.D. 466: The accused on a well-lighted road ran into deceased who was wheeling his cycle near the gutter. The car ran on for 175 feet and hit a pillar; the road was empty; the track of the car showed swerves to right and left; no brakes were applied; deceased was carried 70 feet and his cycle the whole 175 feet. Accused stated that he recollected nothing. Held, that his negligence was established (in a criminal case) beyond reasonable doubt.

R. v. Koen, 1937 A.D. 211: The accused in a well-lighted street collided with a pedestrian, carried the body some 25 yards, slowed down, then accelerated and drove home. Held, that this evidence amounted to prima facie proof of his negligence, which when he failed to answer it became sufficient to convince beyond reasonable doubt. 'A reasonably careful driver does not collide with a pedestrian in such circumstances.' Cf. *Bezuidenhout v. Berman*, 1929 O.P.D. 148; *Davies v. Union Govt.*, 1936 T.P.D. 197, and *Baratz v. Johannesburg Municipality*, 1913 T.P.D. 732, where the courts applied Scottish decisions to the effect that where a motorist runs down a pedestrian in broad daylight a presumption of negligence arises.

Where a motor-car collides with a parked car as a result of losing a wheel no presumption of negligence can be inferred. *Clements v. Esmeraldo*, 1946 C.P.D. 964, is not a case of *res ipsa loquitur*, since both sides had given evidence (at 970) and the case was decided on the question of onus (at 971-2). The headnote of this case is, therefore misleading.

Nor does the maxim apply merely because a driver collided with an unlighted stationary vehicle at night-time (*Sauerman and others v. New Zealand Insurance Co., Ltd.*, 1958 (4) S.A. 289 (N) at 295).

Sauerman v. Barnard, 1958 (4) S.A. 149 (O): Where a car was travelling at night and gradually veered to the right of an open road, then travelled parallel with it and thereafter capsized, it was held that *res ipsa loquitur* applied and that the inference to be drawn was that the driver had fallen asleep.

Stiff v. Davidson, 1927 N.P.D. 77: Where a motorist collided with a policeman while the latter was regulating traffic in the middle of the intersection it was held that this fact revealed a prima facie case of negligence.

Plaintiff, travelling in defendant's car, was, owing to her injuries, not able to say how the accident occurred. The facts showed that the defendant had collided with another car travelling in the opposite direction. It was daylight and the road was straight, the collision taking place in the middle of the road. The Court rejected the defendant's explanation that the accident was caused by the other car's having suddenly swerved into her, both on account of the improbability of such story and because of the position the cars were found in after the impact. Held, that the plaintiff was entitled to damages (*Salmons v. Jacoby*, 1939 A.D. 589).

The defendant was travelling fast when he suddenly came upon an unlighted lorry. He swerved into the way of an oncoming motor cycle ridden by the plaintiff. Held, that the doctrine of *res ipsa loquitur* applied and that the defendant had failed to show by a balance of probability in his favour that he had acted without negligence (*Van Staden v. May*, 1940 W.L.D. 198).

Plaintiffs were the owners of a certain building whose verandah columns were damaged by the motor-car of the defendant who had collided therewith. Defendant in his plea admitted causing the damage, but denied that he acted negligently, stating that he was forced on to the verandah by the negligent and reckless conduct of a third party. At the trial plaintiff gave evidence of damage and of the fact that defendant's car was found on the pavement after the collision. Defendant closed his case without leading evidence. Held, that plaintiffs were entitled to damages (*Fisher v. Coleman & Malga*, 1937 T.P.D. 261).

De Wet v. Adams, 1935 T.P.D. 247: On a broad, straight road in daylight, defendant's car suddenly swerved across and collided with plaintiff's. Defendant pleaded, and gave in evidence, that a mechanical defect had suddenly developed in his steering-gear, viz. a fractured king-pin. Expert evidence was that it was highly improbable that the defect (which was found to be present after the accident) could have caused the swerve, but that it was not impossible. Held that, as there was not a sufficient preponderance of probability against the explanation, judgment of absolution must be entered. *Sed quaere* on the facts. Per Fisher J.: *Res ipsa loquitur* could not apply, since the accident might have happened from a variety of causes (*sed quaere*, since such causes as skid, puncture, or sudden interposition of animal or vehicle, were eliminated; see at 250). Contrast *R. v. Naidoo*, 1936 N.P.D. 439, where defendant's evidence of a sudden defect in the steering-gear was disbelieved (there being apparently no evidence that any such defect existed after the accident).

Petersen v. Hartman, 1935 E.D.L. 59: Defendant's car suddenly went off the road to its left, and after travelling on the rough verge for some distance came back into the road and collided with the deceased. Defendant led evidence that her car had recently been greased and that not infrequently grease was forced on to the brake, which if suddenly applied might cause a swerve. She had suddenly applied her brakes for the first time after leaving the garage, immediately before the swerve. Held, that an inference of negligence had arisen from the accident, but that defendant's explanation was a reasonable one and plaintiff must fail.

Baumann's Selected Products, Ltd. v. Porter, 1934 C.P.D. 383: Defendant's vehicle, for no apparent reason, swerved suddenly across the road into plaintiff's. Held, following *Bredell v. Bosman*, 1932 C.P.D. 131, that a presumption of negligence arose. Defendant attributed the swerve to a skid; held, that the magistrate rightly found that he was negligent in not anticipating the skid, on a greasy road, and correcting it in time. In *Bredell v. Bosman*, it was held that from the fact that the driver of a horse-drawn vehicle was drunk no presumption arose that his negligence caused the accident; but that the presumption did arise when his vehicle, at the time of collision, was on its wrong side. This seems sound.

Gordon v. Mathie's Estate, 1933 C.P.D. 353: A presumption of negligence arises when a bicycle when being ridden crashes into a plate-glass window (after apparently surmounting the pavement). This seems sound, where defendant gives no explanation.

Botha v. Tunbridge, 1933 E.D.L. 95: Defendant's car at a bend in a gravelled road which at night was dangerous to those who, like defendant, did not know it, hit some stones on the edge of the road and overturned. Positive evidence was given for the defence negating excessive speed. Held, that negligence had not been established. Per Gutsche J.:

'This is clearly not a case where it can be said off-hand that, because the car overturned, there must of necessity have been negligence by reason of excessive speed. Conceivably motor-cars may come to grief . . . without negligence, from a variety of causes . . . the plaintiff must therefore establish that the driver drove faster than the circumstances warranted.'

And in commenting on *Halliwell v. Venables* (below):

'The decision would be easier to follow if the plaintiff had shown, as presumably she could, that the capsizing was not due to a sudden defect in the car.'

(In *Hamilton v. MacKinnon* at 363, Curlew J.A. observes that the attention of Gutsche J. had apparently not been drawn to *McGowan v. Stott*, below. The decision is obviously correct on the facts; the dicta too do not seem too wide, having regard to the nature of the case being discussed.)

Kuranda v. Sinclair, 1932 W.L.D. 1: On a dry tarred road, at a dangerous bend, defendant's car overturned. There was some evidence of excessive speed, and the tracks showed a side-skid. No evidence was given of any defect in the car. Defendant said that she could not say exactly what happened. Held, that a presumption of negligence arose which had not been met (following *Halliwell v. Venables*). The facts distinguish the case from *Botha v. Tunbridge*, but should plaintiff not have led evidence as to the condition of the car after the accident? (It is not certain from the report that negative evidence of no defect was not given.)

Halliwell v. Venables (1930) 99 L.J.K.B. 353: On a broad, empty road at night, defendant's car overturned on a bend. The car apparently turned over twice, and there were other indications of speed. Defendant had been driving with one hand on the wheel; there was expert evidence that with that car on that bend this was dangerous. Held, by the Court of Appeal, that the judge should not, at the close of the plaintiff's case, have withdrawn the case from the jury. Per Scrutton L.J., the facts required explanation by the driver, i.e. *res ipsa loquitur*.

McGowan v. Stott (1923) 143 L.T. 217: A lorry on a dry road mounted the pavement at speed, hit plaintiff, and crashed into a wall. Held, that the plaintiff should not at the close of his case have been non-suited, since *res ipsa loquitur*. *Wing v. L.G.O. Co.* [1909] 2 K.B. 652 distinguished—there the road was greasy and the bus was travelling very slowly.

Ellor v. Selfridge (1930) 46 T.L.R. 236: Similar case to *McGowan v. Stott*; defendant called no evidence; the trial court awarded damages; an appeal was dismissed.

Arthur v. Bezuidenhout & Mieny, 1962 (2) S.A. 566 (A.D.): Appellant's vehicle had suddenly swerved to its right on to its incorrect side of the road and collided head on with respondent's (plaintiff's) vehicle. After the accident the steering sector shaft of defendant's vehicle was found to be broken. Held, that the court below had erred in placing the onus on the defendant to establish his plea of inevitable accident, but nevertheless the plaintiff had established by a balance of probabilities that the defendant had been negligent.

Bee v. Railway Passengers Assurance Co., 1947 (4) S.A. 356 (N): Where a lorry-driver could see in poor weather conditions for a distance of only about 40 yards and collided with the deceased pedestrian and the defendant led no evidence from its own driver. Held, there were sufficient facts from which negligence might be inferred.

Groenewald v. Conradie, 1965 (1) S.A. 184 (A.D.): Conradie swung suddenly across the road to his right. Groenewald lost his memory and was unable to recollect what happened immediately before the collision and the trial court had granted absolution from the instance to his claim. Held that the trial court had been wrong and the matter was referred back to the court *a quo* to assess his damages.

Rankisson & Son v. Springfield Omnibus Services (Pty.) Ltd., 1964 (1) S.A. 609 (D): Owing to a sudden and unforeseen brake failure defendant's bus swerved into the way of plaintiff's car. Held, that the failure of the brakes was not due to defendant's careless or inadequate maintenance, his evidence being confirmed by an expert.

(b) OTHER CASES

S.A.R. v. General Motors, 1949 P.H., J. 3 (C): When a motor vehicle falls out of a sling of a crane due to no external agency, such as a gale, then *res ipsa loquitur* applies.

Mitchell v. Maison Libson, 1937 T.P.D. 13: Plaintiff's head was burnt by defendant's permanent waving apparatus; the evidence showed that scorching was most exceptional, and that in the vast majority of cases where it occurred it was the result of negligence. Held, *res ipsa loquitur* applied. 'A defendant who wishes to rebut the presumption must produce evidence to show', e.g. a sudden defect in the apparatus. General observations on the maxim.

Koenig v. Hotel Rio Grande, 1935 C.P.D. 93: From the mere fact that plaintiff slipped on defendant's floor no presumption of negligence arises. cf. *Philpott v. Dairy Supply Co.*, 1934 N.P.D. 331.

Strydom v. Griffin Engineering Co., 1927 O.P.D. 47: *Quaere* whether the explosion of a boiler recently installed raises a presumption of negligence; held, that if it does, it had been rebutted by proof of due care. In *Block v. Pepsys*, 1918 W.L.D. 18, the maxim

was held to apply to the bursting of a metal siphon being filled with gas; in *Clair's* case, 5 E.D.C. 311, to the bursting of the boiler of a crane.

Paterson v. S.A.R., 1931 C.P.D. 289: Plaintiff's husband was run down while shunting. Held, that the facts proved raised the inference that he had been injured owing to the negligence of the Administration in allowing an open culvert to be unguarded when shunting took place at night. In this case certain English cases were considered.

Katz v. Webb, 1930 T.P.D. 700: The mere fact that a horse bolts from a yard to which it has been taken to be shod raises no presumption of negligence against the smith. But there being evidence that one of defendant's horses had been seen interfering with it, it was ruled that negligence had been established by preponderance of probability.

As to whether a presumption arises from the mere fact that a horse in harness causes an accident, see *Moffatt v. Bateman*, L.R. 3 P.C. 115, in which the Privy Council negatived the proposition; applied *Cowell v. Friedman*, 5 H.C.G. 22; *Gibson Bros. v. Otto*, 8 H.C.G. 193. In *Cape Town Municipality v. S.A. Breweries*, 1912 C.P.D. 307, however, Maasdorp J.P. laid down what is surely the true rule, that 'the court must have regard to the nature of the accident'; so that in some cases the presumption will arise while in others it will not. In *Viljoen v. Cardoo Bros.*, 1925 C.P.D. 271, Van Zyl J. applied the maxim to a horse suddenly swerving in traffic; but Gardiner J. rests upon evidence of previous vicious behaviour. In view of *Hamilton v. MacKinnon*, it seems likely that for the presumption to arise there must be something more than the mere bolting or swerving.

Miller v. Durban Corporation, 1926 N.P.D. 241: *Quaere* whether the maxim applies to the collapse of platforms stacked against a wall; held, that in any event the evidence of careful stacking absolved the defendant.

Mancede v. Lang, 1922 E.D.L. 169: The maxim does not apply where sheep, after being dipped, develop anthrax.

Union Govt. v. Sykes, 1913 A.D. 156: *Quaere* whether it applies to a fire caused by a locomotive.

Van Wyk v. Lewis, 1924 A.D. 438: It does not apply to the leaving of a swab in the patient, at any rate as against the surgeon, who is entitled to rely in this matter on the theatre-sister. Nor to the breaking of a needle inserted in the patient, where the latter may have moved (*Mitchell v. Dixon*, 1914 A.D. 519).

Liddell v. Transvaal Govt., 1906 T.S. 863: It probably applies to the fall of a ceiling; though in this case there was direct evidence of inferior materials and of warning of the danger.

Gifford's case, 1874 Buch. at 119-20; Probably it applies where a ship is damaged in docking; this, however, was a contractual case.

In *Grant v. Australian Knitting Mills* [1936] A.C. 85, it was applied to the occurrence in underwear of a dangerous substance, the evidence being that if the processes of manufacture were properly carried out the substance would be completely washed out but that otherwise it might remain. For other English cases see Halsbury, vol. 23, at pp. 672-5, 36 English and Empire Digest at 88.

(k) IDENTITY

Usually the identity of the defendant is fixed by the personal observation of witnesses, but inferences may be drawn from the fact that the vehicle concerned in the collision is registered in the name of the defendant (*R. v. Chapman*, 1934 C.P.D. 338) or that he had previously been driving the said vehicle. In *R. v. Mahametz*, 1941 A.D. 1, the following statement in Gibbs's *Collisions on Land* was approved and followed:

'To connect a driver with an accident or to establish negligence on his part, evidence may be adduced of his conduct at other points of the road before and beyond the scene of the occurrence.'

In this case evidence of the speed of the accused a mile away from the scene of the accident was held to be admissible on a charge of culpable homicide.

Statutory Presumptions

Ownership. Section 155 of the Ordinances provides that where in any prosecution under the Ordinance it is material to prove who was the driver of the vehicle concerned, it shall be presumed, until the contrary is proved, that such vehicle was driven by the owner thereof. The section also presumes that any car parked in contravention of law shall be deemed to have been parked by the owner thereof.

It might have been expected that the definition of 'owner' in section 1 of the Ordinances would include the person in whose name the vehicle was registered. Such provision would have tied up with the terms of section 173 of the Ordinances in enabling the police to ascertain from the person, who registered the car, who the actual owner thereof is, or who was the driver at the time. It is not unusual for the actual owner to allow his motor vehicle to be registered in the name of another person, e.g. in his wife's name, or vice versa, while still retaining the legal ownership of the said vehicle. In such cases neither spouse can be compelled to disclose, in a court of law (if such were the case), that his or her spouse was the actual driver at the time, since neither a husband nor a wife can be compelled to testify against the other.

Public Road. In any prosecution under the Ordinances if it is alleged that the offence was committed upon a public road, such road shall be presumed to be a public one until the contrary is proved (section 150).

'Public Road' is defined in section 1 of the Ordinances. This definition has been considered and discussed *ante*, p. 352, in regard to the decision in *S. v. Kriel*, 1968 (3) S.A. 451 (T).

Urban Area. In any prosecution under the Ordinances if it is alleged that an offence was committed on a public road in an urban area, such road shall be presumed to be a public road in the urban area named until the contrary is proved (section 151).

(I) BY-LAWS AND REGULATIONS

In most of the provinces and municipalities of the Republic there exist numerous regulations and by-laws, for the purpose of controlling the traffic, and designed to ensure the safety of all users of the road. The question frequently arises, therefore, how far, apart from criminal liability, can non-compliance with these rules be regarded as *prima facie* evidence of negligence on the part of the driver guilty of a breach thereof. With the exception of those regulations governing speed limits, the heavy balance of judicial authority is in favour of the proposition that non-observance, or breach, of such regulations as are particularly designed for the safety and protection of all road-users can, and would be, regarded as *prima facie* evidence of the negligence of the culprit concerned (*Morley v. Wicks*, 1925 W.L.D. 13; *Phillips v. Britannia Laundry Co.* [1923] 1 K.B. at 548-50 and *Good v. Posner*, 1934 O.P.D. 90 at 97; *S. v. Peinke*, 1963 (1) S.A. 96 (E). Cf. *Rawles v. Barnard*, 1936 C.P.D. at 77), the attitude adopted being that, while an infringement of by-laws is **not per se proof of negligence**, it is **nevertheless evidence from which negligence may properly be inferred** (*Klaas v. Serfontein*, 1940 C.P.D. 616; *Hughes v. McGoff & Vickers* [1955] 2 All E.R. 291). See also (1938) *S.A.L.J.* at 409-27; *R. v.*

Nathan, 1938 T.P.D. 17; *London Passenger Transport Board v. Upson and another* [1949] 1 All E.R. 60 (H.L.). In *Watt v. Western Assurance Co.*, 1952 (3) S.A. 778 (W), however, a pedestrian recovered damages notwithstanding her own breach of the regulations in failing to cross at a pedestrian crossing.

The rule is founded on the principle that where, in the interests of the safety of the general public, a statutory duty is cast upon a person, and he commits a breach of that duty, any member of the public who can show that he has suffered damage or injury from that breach has, in general, a right of action for damages (*Patz v. Greene*, 1907 T.S. 427). Per Solomon J.:

‘Everyone has the right, in my opinion, to protect himself by appeal to a court of law against loss to him by the doing of an act by another which is prohibited by law . . . where the prohibition is in the public interest then any member of the public, who can prove that he has sustained damages, is entitled to his remedy.’

See also *Liquidator C.C.R. v. Notling*, 8 S.C. 28; *R. v. Press*, 1938 C.P.D. 356 (overtaking on the left). It should, however, be noted that, before the foregoing rule may apply, the statutory duty imposed by the regulation which has been breached must be a duty to the class of persons to which the complainant belongs. Thus in *Belstedt v. S.A.R.*, 1936 C.P.D. 399, a Railway regulation provided that all carriage doors must be closed before the train is allowed to depart. A plaintiff minor was held not to be entitled to rely upon a breach of this regulation as establishing negligence against the Administration, since, as the Court held, the regulation in question was not ‘one intended for the protection of prospective passengers’. See also *Steenkamp v. Steyn*, 1944 A.D. at 555 (dazzling lights), and *Sand v. S.A.R. & H.*, 1948 (1) S.A. 240 (W) (in regard to regulations re shunting trucks in a railway yard). From this it follows that if a regulation validly imposes an express duty on drivers of vehicles, and a person can show that in using the highway he has suffered damage directly and decisively caused by a breach by the driver of the by-laws or regulations, made to prevent accidents, he will probably have a civil action for relief. (See also *ante*, pp. 5-7.)

To succeed in an action on this ground, however, **three elements** must concur; firstly, the damage must flow directly and decisively from the breach of the duty imposed by the legislature; secondly, that duty must be validly imposed, and thirdly, the duty must be imposed to protect a section or class of the public which includes the plaintiff (*Sand v. S.A.R.* (*supra*); *Clark and Wife v. Brims* [1947] 1 All E.R. 242 (K.B.); *Watt v. Western Assurance Co.*, 1952 (3) S.A. 778 (W) at 785). The first element is considered under the treatment of contributory negligence and the second in the light of whether the enactment is *intra* or *ultra vires* the power of the parent statute.

Dealing with the first element, it follows that, notwithstanding the fact that the other party has been guilty of a breach of a by-law, the plaintiff or complainant must still be careful, for if he is also guilty of negligence he will suffer apportionment of damages (*Pincus v. Solomon*, 1942 W.L.D. 243—for the facts of which see *ante*, p. 446). In the case of *Malcolm v. Kimber*, 1934 N.P.D. (J/C 218/1934), there was a collision between two motor-cars which was found to be due to the joint and simultaneous

negligence of both drivers in having failed to keep a proper look-out. Held, that the plaintiff was not in those days entitled to succeed. Per Hathorn J.:

'She also relied on a municipal by-law which gives the right of way at the intersections of streets to the car on the left, as hers was. Although no doubt the defendant was negligent in not observing the by-law it is perfectly clear that the by-law did not relieve the plaintiff's driver from his common-law obligation to keep a proper look-out. No authority is needed for such a proposition; but if it is, it will be found in the case of *Robinson v. Henderson*, 1928 A.D. 138, in which Solomon C.J. pointed out at 114 that although the driver of a motor-car may have the right of way at a crossing, he must have regard to traffic in the other street. The present case is governed by the decisions of *Wishart v. Mason* and *Murray v. Britz*, 1933 N.P.D. 352 (J/C 325), in which the Court declined to award damages to a negligent plaintiff in circumstances similar to those of the present case.'

In *Barkway v. South Wales Transport* [1950] 1 All E.R. 392 (H.L.) the Court held that a breach of a statutory duty, to keep all motor vehicle tyres free from defect, did not found an action for negligence in this respect under the common law. Nor is it negligence, per se, to park on the incorrect side of the road in contravention of a regulation (*Matthews v. Schechter*, 1925 C.P.D. 183); nor to stop a vehicle on the roadway of a public road where it would be likely to constitute a danger of obstruction to the public (*Pretorius v. South British Insurance Co.*, 1963 (3) S.A. 8 (W) at 10; *John Williams Motors, Ltd. v. Minister of Defence*, 1965 (3) S.A. 729 (O) at 73).

Ultra vires

In regard to the second prerequisite, it is trite law that, before the legislation of a subordinate legislature can be regarded as valid, it must satisfy two tests: (a) it must be within the four corners of the delegated powers of the legislating body, and (b) it must be reasonable. The first requirement is of little importance in this connection, but the latter is of great importance, as will be instanced in the decision of *R. v. Mogobaya*, 1928 T.P.D. 234, where it was held that the Provincial Council had no power to make it an offence for a Native to drive a car carrying a European, for legislation discriminating between classes of persons was repulsive (*Mphahlehle v. Springs Municipality*, 1928 T.P.D. 50). Unless, furthermore, the by-law or regulation is **clear** and concise it will not be upheld (*R. v. Wiese*, 1916 C.P.D. 681), neither will it be upheld if it involves oppressive interference with the rights of others (*Farah v. Johannesburg Municipality*, 1928 T.P.D. 169), though a regulation making it an absolute rule for traffic to 'keep to the left of the centre of the road when approached by another vehicle' is *intra vires* and lawful (*R. v. Goode*, 1930 C.P.D. 180). (See *ante*, pp. 352-4.)

In the following cases a breach of the by-law concerned was held to be *prima facie* evidence of negligence.

In *Cardoso v. S.A.R.*, 1950 (1) S.A. 773 (W), however, where an accident took place in a yard where it had been the practice for a number of years for firms to send their vehicles to certain lines on to which trucks were shunted in order to take goods from the trucks, it was held that railway servants, as reasonable men, must realize that persons using the yard might inadvertently or negligently put themselves or their vehicles across the lines, and that a failure to take reasonable precautions against such possibility was negligence. Even if the drivers of the vehicles were regarded as trespassers they could recover for injury caused by negligence (*ibid.*).

Where a statute prescribes that certain precautions are to be taken for the safety of others, then a failure to take such precautions resulting in injury will, *prima facie*, found an action for damages provided that the statute is enacted for the benefit or protection of a particular class of persons and the injured person is of that class. But where the purpose of a statute is not the protection of an injured person, or the class to which he belongs, then the breach of the statute does not *per se* constitute a breach of any duty of care owed to the injured person on which an action may be based (*Sand & Co. v. S.A.R.*, 1948 (1) S.A. 230 (W)).

Where the defendant had, in not observing the duty laid down of passing a tram at not more than a walking pace, knocked down a boy of 4 years of age (*Harmsworth v. Smith*, 1928 N.P.D. 174).

Where the defendant had failed to comply with the by-law prohibiting all vehicles from crossing a 'stop street' without first coming to a standstill (*Ulrich v. Pepler & Co. (Pty) Ltd.*, 1935 C.P.D. 46; *Klug v. Franco*, 1940 P.H., O. 1 (N)).

Where the defendant had failed to keep to his left centre of the road, in accordance with the obligation imposed upon him by the traffic regulations, and as a result had injured the plaintiff (*Mayers v. Lemonsky*, 1924 C.P.D. 425; *Mizen v. Ries*, 1914 E.D.L. 511, and *Morley v. Wicks*, 1925 W.L.D. 13).

Overtaking a cyclist on his left in contravention of the regulations under Ord. 12 of 1926 (*R. v. Press*, 1938 P.H., O. 15 (C)).

In the following cases it was ruled that a breach of the regulation concerned was **not prima facie negligence**:

Where plaintiff, during a black-out, ran into defendant's car standing without a red rear-light. Held, that the duty imposed by the statute of having a red rear-light is not one enforceable by any aggrieved individual. In this case it was found that the defendant reasonably believed that his red rear-light was burning (*Clark and Wife v. Brins* [1947] 1 All E.R. 242).

In allegations of driving at an **excessive speed**, therefore, it has been held that a non-compliance with the speed limit prescribed by the local authority concerned was not evidence *per se* of negligence (*R. v. Freeman*, 1931 N.P.D. 460; *Rawles v. Barnard*, 1936 C.P.D. 74; *R. v. Nathan*, 1938 T.P.D. 171).

A breach of the regulations, relating to dangerous trades and imposing duties on the workmen therein, does not in all cases automatically furnish a defence to the employer when sued for damages for breach of statutory duties imposed on the employer (*Lewis v. Denye* [1940] A.C. 929).

Failure to have a rear-light on a stationary car (*Clark and Wife v. Brins* [1947] 1 All E.R. 242 (K.B.)).

See also *Phillips v. Britannia Hygienic Laundry* [1923] 1 K.B. at 837-8, and *Badham v. Lambs* [1946] 1 K.B. 45.

2. PROCEDURE

(a) STATEMENTS TO POLICE

Under section 135(1)(f) of the Ordinances it is a criminal offence for the driver not to report to the nearest police station the fact that an accident, causing damage to another person or to his property, has occurred. It is the duty also of the police officer at or near the scene of the accident to take the names and addresses of all persons who are able to throw light on the incidents leading up to the accident and the facts indicating the responsibility of the relative parties thereto. These statements are obviously taken for the purpose of enabling the public prosecutor to know what person, if any, is to be charged, and the question then arises as to the admissibility of these statements in a court of law, especially if one of the drivers making such statement is afterwards sued by the other or charged with the crime

of negligent driving. The answer depends on whether these witnesses are **informants** or not. In Natal it was once decided that they are informants and that therefore their statements to the police are privileged from disclosure on the ground of public policy (*Dyer v. Dickson*, 1925 N.P.D. 304, followed in *Doran v. Mayor and Councillors of Durban*, 1934 N.P.D. 384). These decisions have, however, been overruled by *R. v. Van Schalkwyk*, 1938 A.D. 543, which decided that the denotation of the word 'informer' is limited to those persons who first notify the police that there has in fact been a crime committed; all other persons from whom statements are taken (in order to enable the prosecutor to ascertain whether to take action or not) being regarded, not as informers, but as **witnesses**. Accordingly a person making a statement about a collision to the police may have that statement produced against him in a civil trial (*Pechey v. Lutchman*, 1963 (4) S.A. 112 (D) at 115). See, also, *Attorney-General v. Van Wyk*, 1932 T.P.D. 359, and *Glinterkamp v. Lipschitz*, 1936 C.P.D. 536. In the latter case the statement of the defendant made to two police officers as to how the accident occurred was admitted in evidence against him. In *Van Schalkwyk's* case, however, the ruling was made subject to the rider that where one or other of the drivers of the colliding cars lays a charge against the other he **might** be regarded as an informer. See also *Ex parte Minister of Justice*, 1945 A.D. 653. Even where the witness is an informer, a trial judge is vested with a discretion to order the production of his statement to the police in order to show the innocence of the accused (*R. v. H*, 1952 (4) S.A. 344 (T) at 348).

It has been held that where copies of statements given to the police have been obtained by a party in a civil suit, such must, on discovery, be disclosed (*Sutherland v. Banwell*, 1938 A.D. 484).

(b) ADMISSIONS

(i) Generally

Proof of negligence is occasionally supplied by the admissions of the defendant at the time of the collision. While of high probatory value they must nevertheless be tested in the light of the peculiar circumstances prevailing at the time. Thus in *Heneke v. Royal Insurance Co.*, 1954 (4) S.A. 606 (A.D.) at 613, it was stressed that the chivalrous remark of the appellant, 'Don't worry, lady, it is all my fault', could not be taken seriously in view of the fact that he was in great pain and agony at the time. So also an offer to pay expenses was held not to be an unequivocal admission of negligence (*Botha v. Van Niekerk*, 1947 (1) S.A. 699 (T) at 702-3). On the other hand such unequivocal acceptance of liability, inconsistent with the defence set up, may weigh heavily against the defendant (*Ward v. Steenberg*, 1951 (1) S.A. 395 (T)).

(ii) By Servants

The question of the admissibility of a servant's confessions or admissions, having now been declared to be a matter of substantive law, rather than a rule of evidence (*Botes v. Van Deventer*, 1966 (3) S.A. 182 (A.D.)), has been dealt with in the chapter relating to Master and Servant, for which see *ante*, pp. 120-1, and (1966) 83 S.A.L.J. at 416.

(iii) *Insurees*

In *Botes v. Van Deventer* (*supra*) the learned Judge left the question open as to whether the admissions of a servant or employee were admissible as against the insurance company of the defendant master or employer. In this regard it is submitted that, apart from the undermentioned exceptions, the driving servant's admissions are not receivable as against a defendant insurance company (*Van der Westhuizen v. S.A. Liberal Insurance Company*, 1949 (3) S.A. 160 (C); *Roberts v. British America Insurance Co.*, 1953 (1) S.A. 127 (C); *Vorster v. New Zealand Insurance Co.*, 1957 (2) S.A. 255 (W); *Olivier v. Botha and another*, 1960 (1) S.A. 678 (O), and *Mbizela v. Yorkshire Ins. Co., Ltd.*, 1961 (3) S.A. 820 (N)). These decisions are preferential to the contrary decisions in *Van Zyl v. S.A.N.T.A.M., Bpk.*, 1948 (2) S.A. 815 (O), and *Nel v. Sun Insurance Co., Ltd.*, 1951 (1) S.A. 896 (E).

(iv) *Exceptions*(a) *Declarations against interest and privilege*

If, at the trial, the driver of the vehicle concerned is dead, such admissions would be receivable as against his estate on the basis of declarations against interest (*Williams N.O. v. Eagle Star Insurance Co., Ltd.*, 1961 (2) S.A. 631 (C)). In regard to the discovery of accident reports in the hands of insurance companies claimed by them to be privileged from disclosure, see (1952) 69 *S.A.L.J.* at 399-412 and also *Boyce v. Ocean Accident & Guarantee Corp., Ltd.*, 1965 R.L.R. 668.

(b) *Res gestae*

Where a pedestrian sues an insurance company of the driver of a motor vehicle, who is alleged to have been negligent, it is permissible to admit the spontaneous statement by the driver (e.g. that he did not know what had happened) which was made while the latter was shocked and when his reflective powers are in abeyance, as showing his state of mind and whether he had been negligent or not (*Vermaak v. Parity Insurance Co., Ltd. (in liquidation)* 1966 (2) S.A. 312 (W)).

(c) **PHOTOGRAPHS AND PLANS**

Nothing illustrates to the court better how and why the accident took place than a plan of the scene of the collision, elucidated, if necessary, by photographs. Plans should, therefore, in all cases where the location of the particular spots is material, be put in (*R. v. Matsi*, 1936 P.H., H. 100 (C)), and, in culpable homicide cases, a proper plan, drawn to scale and showing distances and all essential points, should be presented (*R. v. Stipp*, 1940 E.D.L. 29). These should not, however, show a partial reconstruction of the events complained of (*R. v. Pretorius*, 1930 N.P.D. 352), nor should they contain matters which may suggest favourable answers to the witnesses (*R. v. Mbulela*, 1921 W.L.D. 59). Photographs should be cautiously regarded, since experience shows that the perspective in a photograph is not the same as is observable by the naked eye, that is to say, an object in a photograph may appear at an infinite distance away whereas it is in reality comparatively close. (See, also, *R. v. Lemes*, 1957 P.H., H. 35 (A.D.)).

Witnesses should be asked to state specifically whether they pointed out the relative spots to the police draughtsman or photographer, for it is not sufficient for the latter merely to say that they did so when he produces his plan or photograph (*R. v. Ndhlovu*, 1947 (1) P.H., H. 106 (A.D.)). A copy of the original plan, which was made by another person, is hearsay and not the best evidence. Where a policeman, who drew the original plan did not testify at the trial and when a copy of the plan was handed in by another police officer, it was held that it was inadmissible (*Johannes v. Auto Protection Insurance Co., Ltd.*, 1962 (3) S.A. 253 (C)).

A plan drawn by a policeman in which he has marked certain spots or points which amount to an expression of his **opinion** (e.g. the exact spot of the collision) is not such a plan as is referred to in Rule 36(1)(a) of the Uniform Rules of Court (*Mabalane v. Rondalia Assurance Corpn. of S.A., Ltd.*, 1969 (2) S.A. 254 (W)). Here Hiemstra said (at 255):

'I am of the opinion that the point "X" on the plan merely represented a conclusion by the policemen. He does not say on the key how he arrived at that conclusion. There may have been pieces of glass on the road, or a bystander may have told him. However that may be, it is an opinion or a conclusion and not a physical feature objectively existing. It is permissible to say on the key "pieces of glass and earth were lying at point 'X'", and in the circumstances contemplated by the rule, the fact would be proved that pieces of glass and earth were lying there. What must be inferred therefrom, would be for the Court to say.'

(d) PARTICULARS OF NEGLIGENCE

Criminal cases

Generally speaking, if the indictment sufficiently follows the wording of the statute and indicates the time and the place where the offence was alleged to have been committed, the charge is a good one in law and it is not necessary to go further and aver particulars as to how the offence is carried out (*R. v. Abbas*, 1916 A.D. 233; *R. v. Du Toit*, 1922 C.P.D. 461; *R. v. Horne*, 1934 C.P.D. 401; *R. v. Philips*, 1907 T.S. 722, and *R. v. Clarke*, 1924 N.P.D. 47), so that the accused cannot, on appeal, claim that he did not have sufficient information in the summons or indictment with which to prepare his defence. His remedy, where he desires such further information, is to apply for further particulars in terms of section 179 of Act No. 56 of 1955, for, in spite of the terms of section 322 of Act No. 56 of 1955, the accused is entitled to particulars if he asks for them (*R. v. Neethling*, 1938 C.P.D. (J/C 39/38); *S. v. National High Command*, 1964 (1) S.A. 1 (T)). In the last case it was held (at 3) where an indictment is defective for lack of particularity, an adjournment should be allowed and the State be ordered to supply the further particulars. Should further particulars be furnished the State is bound by them, but should the court refuse to comply with his request (to instruct the State to supply these particulars), then the conviction will, on appeal, be set aside (*R. v. Verity-Amm*, 1934 T.P.D. 416). This may be regarded as the leading authority on the subject in so far as the rendition of particulars on a charge of negligent driving of motor vehicles is concerned (*Union Govt. v. Bergstedt*, 1946 (2) P.H., O. 29 (C)). For other decisions see *R. v. Meaker*, 1933 O.P.D. 215; *R. v. Woest*, 1929 E.D.L. 179, and *R. v. Barnard*, 1937 C.P.D. 190. The court should grant the application even after evidence has been ed if it is necessary to enable the accused to know the case which it is

proposed to make against him (*R. v. De Coning*, 1954 (2) S.A. 647 (N)). The application should not obstinately be refused merely because it is made after plea (*ibid.*). If the accused is prejudiced by a refusal to give particulars the Supreme Court will grant a *mandamus* directing the magistrate to order the State to furnish the necessary particulars (*Behrman v. Regional Magistrate*, 1956 (1) S.A. 318 (T)).

The only apparent exception to the rule indicated above is contained in the decision of *R. v. Lavenstein*, 1919 T.P.D. 348, where the accused had had his application for particulars refused and the Court, on appeal, declined to set aside his conviction, but this case was one in which there had been a **preparatory examination** where full details of the evidence against the accused had been rendered available to him for his defence. But see *R. v. Vonsteen*, 1939 T.P.D. at 108. In this case particulars had been refused by the magistrate, but the Court of Appeal nevertheless confirmed the conviction on the ground that there had been no 'failure of justice'.

From the above considerations it follows that, if certain particulars have been given, the State is bound by them and the accused may not therefore be convicted on other, and different, particulars of negligence (*R. v. Kroukamp*, 1927 T.P.D. 412; *R. v. Wilkin*, 1941 T.P.D. 294; *R. v. Eilken*, 1945 P.H., O. 23 (T); *R. v. Barnard*, 1937 C.P.D. 190; *R. v. Anthony*, 1933 T.P.D. 601). In *Kroukamp's* case the particulars supplied were that the accused 'ran down complainant on a portion of the main road which was closed for repairs', while the conviction was based on the fact that the accused had knocked down the complainant who was walking on a different portion of the road and because the accused had failed to sound his hooter. Held, that the conviction should be set aside. See also *R. v. Hesketh*, 1936 N.P.D. 415, where the particulars supplied were that the accused 'failed to keep a proper look-out and/or failed to keep his car under proper control'. The magistrate in convicting him took the view, however, that he was guilty because he turned without signalling his intention to turn. In this case the appeal was also allowed (see also *R. v. Werner*, 1937 N.P.D. 310).

It has happened that the particulars given have been sufficiently comprehensive in their denotation to cover all the particulars of negligence actually found to be proved at the trial. Thus, where the accused was charged with 'driving over a place where roads intersect without keeping a proper look-out and not having his vehicle under proper control', and it was found that his negligence consisted in his driving his car on the wrong side of the road and at an excessive speed, the Court held that these aspects of *culpa* were covered by the charge as laid (*R. v. Blignaut*, 1935 E.D.L. 93). See also *R. v. Horne*, 1934 C.P.D. 401; *R. v. Sasing*, 1940 O.P.D. at 90.

The particulars of negligence given may be taken either together or in the alternative, but the State should not, in answer to a request for particulars, give a comprehensive list of all possible particulars of negligence of which a motorist may be guilty when driving, but only such particulars as are, or may reasonably be expected to form, the basis of the charge.

In other words the particulars should clarify and not cloud the issue (*S. v. Bera*, 1965 (4) S.A. 411 (N); *S. v. Sadeke*, 1964 (2) S.A. 674 (T) at

675). Accordingly the furnishing of particulars in a **stereotyped form** used for submission to all accused persons generally when applying for further information is an abuse of the process of the court (*ibid.*). (See also *R. v. Shepetin*, 1935 T.P.D. (J/C 333/34); *R. v. Mall*, 1960 (1) S.A. 73 (N); *S. v. Adams*, 1964 (2) S.A. 155 (O) at 161.)

In civil cases

In civil cases each party must, in his pleadings, particularize the grounds of negligence upon which he relies. The general rule is that further particulars are required to 'fill in the picture of the plaintiff's claim' in order that the defendant may plead and to prevent him from being taken by surprise at the trial (*Tahan v. Griffiths*, 1950 (3) S.A. 899 (O)). The defendant has no right to particulars which form no part of the plaintiff's cause of action but are merely facts which the defendant wishes to allege and upon which he wishes to found a plea of confession and avoidance (*Samuels and another v. William Dunn & Co. of S.A. (Pty.) Ltd.*, 1949 (1) S.A. 1149 (T), followed in *Modingwane v. Du Plessis*, 1961 (2) S.A. 705 (T) at 706-7, per Boshoff J.:

'In die onderhawige geval is die grond van aksie van eiseres duidelik en die nadere besonderhede word nie verlang sodat die verweeder beter inlig kan word omtrent die eiseres se regoorsaak nie. Dit word in werklikheid alleen verlang om verweerder in staat te stel om te weet of hy kan beroep op die bepalinge van bogenelde wet. Hy is nie geregtig om 'n versoek om nadere besonderhede vir daardie doel aan te wend nie. Die Hof sal die eiseres gevolglik ook nie beveel om sodanige nadere besondere te verstrek nie.'

Particulars should be sufficiently detailed to enable the defendant to make a tender (*Rosen & Engelstein v. Hawkins*, 1937 T.P.D. 410, and *Margau v. King*, 1948 (1) S.A. 124 (W)).

Where a frivolous application for further particulars is made in order to delay the action, the court may order attorney and client costs (*Reid N.O. v. Royal Insurance Co., Ltd.*, 1951 (1) S.A. 713 (T)). The fact that particulars are within the defendant's knowledge does not relieve the plaintiff from supplying them upon request therefor (*Honikman v. Alexandra Palace Hotels (Pty.) Ltd.*, 1962 (2) S.A. 404 (C)). In collision cases the pleadings may be **amended** to fit the facts adduced but, in this regard the court has a discretion which will not liberally be exercised (*John Williams Motors v. Minister of Defence and another*, 1965 (3) S.A. 727 (O) at 723). The facts may, however, have been impliedly averred (*ibid.*) or, if canvassed fully at the trial, the court of appeal will not reverse the decision of the court *a quo* on this account alone (*ibid.*).

General Damages: The plaintiff is not bound, in a claim for bodily injury resulting from delict, to put a different money value upon each different element in the general damages suffered (*Reid's case (supra)*; *Brown v. Bloemfontein Municipality*, 1924 O.P.D. 226; *Graaf v. Speedy Transport*, 1944 T.P.D. 236). In other words the defendant is not entitled to information as to the plaintiff's injuries or to such elements as pain and suffering, loss of amenities or possible future medical treatment as may be necessary for an exact assessment to be made thereof (*Coop and another v. Motor Union Insurance Co., Ltd.*, 1959 (4) S.A. 273, (following *Reid's case* and *Graaf's case (supra)*).

Where apportionment of damages is sought, the pleadings should aver that the plaintiff has suffered damages partly by his own fault and partly by the fault of the defendant (*Van Niekerk v. Labuschagne*, 1959 (3) S.A. 562 (E)), although it is sufficient for the defendant to allege that his negligence was not the 'proximate cause' of the collision or that it was due to the joint and simultaneous negligence of both drivers (*Van der Merwe v. Fourie*, 1959 (3) S.A. 568 (E)). However, as indicated above (*ante*, p. 70) the court cannot be debarred by the niceties of the pleadings from applying the provisions of the Apportionment of Damages Act unless it can be shown that the other party was **prejudiced** or where the whole matter has been fully canvassed at the trial (*Tonyela v. S.A.R. & H.*, 1960 (2) S.A. 68 (C) at 72).

(e) PLEADINGS

In pleadings the pleader must state facts and facts only. He should not aver the subjective state of mind of the party concerned, such as 'the exhibition of one light gave the plaintiff the impression that a motor cycle was approaching' (*Edwards v. African Guarantee & Indemnity Co.*, 1952 (4) S.A. 335 (A.D.)).

There is no obligation upon the plaintiff to give particulars of damages suffered where he relies on section 70 of Act No. 22 of 1916, nor need he give particulars of negligence since the onus is on the Railway Administration to disprove negligence (*S.A.R. & H. v. Du Preez*, 1953 (1) S.A. 81 (C)).

(f) INSPECTIONS IN LOCO

When inspections *in loco* are made, the record should disclose the nature of the observations of the court. This may be done by means of a statement framed by the court and intimated to the parties, who should be given an opportunity of agreeing with it or of challenging it, and, if they wish, of leading evidence to correct it (*Kruger v. Ludick*, 1947 (3) S.A. 23 (A.D.)).

Another method which is sometimes convenient for the parties is for the court to obtain the necessary statement from a witness who is called or recalled after the inspection has been made (*ibid.*).

(g) NOTICE OF CLAIM AND PRESCRIPTION OF ACTIONS

Most large public bodies such as Municipalities or Government departments, Police Force, Railways, and Defence Force are protected by statute from being taken unawares and are given time within which to investigate and consider claims made against them on account of some act of delictual negligence, or otherwise, on the part of their employees or servants. This protection takes the form of a provision requiring a litigant to give timeous notice of his claim within a specified period after his cause of action has arisen and also obliging him to institute his action within a stipulated period. Should he fail to give the required notice of his claim, or fail to institute his action within the prescribed period, he will forfeit his rights, in the sphere of delict, to claim damages for any injury or harm alleged to have been suffered by him (*Administrator, Transvaal v. Husband*, 1959 (1) S.A. 392 (A.D.) at 894, and *Botha v. S.A.S. & H.*, 1967 (3) S.A. 695 (G.W.) at 697-8).

While the defence of prescription, under Act No. 18 of 1943 may, in terms of section 14 of the Act, be raised at any stage of the proceedings (*Cassim v. Kadir*, 1962 (2) S.A. 473 (N) at 477), there may be instances where the defendant has, by his actions elected to base his defence on some other grounds and, if by so doing he has misled the plaintiff and caused him to alter his legal position as a consequence, the defendant could be held to have waived, or to be estopped from asserting, his right to plead a statutory limitation of action after *litis contestatio* (cf. *Collen v. Rietfontein Engineering Works*, 1948 (1) S.A. 413 (A.D.) at 436). The general rule however is that dilatory pleas must be made *in limine* (*Westphal v. Schlemmer*, 1927 S.W.A. 8 at 10).

(i) *Municipalities*

As indicated (*ante*, p. 149), the object of the statutory period for the limitation of actions in the Cape is to provide a municipality with an early notification of any prospective claim and thus enable it to have the opportunity of investigating the allegations made against it, at an early stage and when the relevant facts can still be investigated (*Sarrahwitz v. Walmer Municipality*, 1967 (4) S.A. 286 (E) at 228, and *President Insurance Co., Ltd. v. Yu Kwam*, 1963 (3) S.A. 766 A.D. at 779–80). In order to obtain the condonation of the court the applicant must establish either that the municipality will in no way be prejudiced or that ‘special circumstances’ exist as a result of which he could not reasonably have been expected to give the requisite notice. Since such provisions are a serious infringement of the rights of individuals they should be given a liberal interpretation in favour of the person who has suffered damages (*Sarrahwitz’s case*). In this case however, the lack of vigilance on the part of the applicant precluded him from obtaining the relief sought. In the Transvaal the court has no powers of condonation. In the Cape, where one of the limbs to section 266 of Ordinance No. 19 of 1951 has been established, the discretion of the court should remain unfettered, and be exercised judicially, regard being had to all the particular circumstances of each case, but the establishment of a *prima facie* case is not essential (*Stokes v. Fish Hoek Municipality*, 1966 (4) S.A. 421 (C)).

This rule of practice has been dealt with by Herbstein and Van Winsen in *Civil Practice* at pp. 108–9, but there are further authorities which may be dealt with as follows.

The word ‘action’ includes a civil process by way of petition (*Dorpsraad van Schweizer Reneke v. Van Zyl*, 1966 (4) S.A. 115 (T)) or by way of notice of motion (*Ngobise v. Johannesburg City Council*, 1966 (2) S.A. 527 (W) at 528) and even for a declaration of rights (*Steelpark Estate Co., Ltd. v. Vereeniging Town Council*, 1963 (2) S.A. 367 (T)). In regard to urgent applications for interdicts, common sense and justice would dictate that, where the applicant’s rights would otherwise be irretrievably lost if the stipulated thirty days of prior notice of action were required first to be given, such requirement should not be insisted upon since the return day of the order for a temporary interdict could be extended to a date which would enable a municipal authority to investigate the matter in the meantime. In Natal, however, by reason of the particular wording of the Ordinance, the plea in bar for failing to give the municipality at least one

month's notice of action has been upheld (*Mamasiya v. Durban Corporation*, 1955 (4) S.A. 208 (N), and *Nkomo v. Durban Corporation*, 1964 (2) S.A. 106 (N)). It is well to observe, however, that should a municipality decline to waive its rights in matters requiring urgent and immediate relief by the court, the measure of ultimate **damages** awarded to the plaintiff would be considerably **increased**.

In this regard it has been held that when an applicant applies to set aside the decision of a local authority on the ground that it had, in refusing him a licence certificate, failed to carry out its statutory duty properly, such proceeding is not an 'action' and therefore the provisions of section 172 of Ordinance No. 17 of 1939 do not apply (*Kempton Park Bombay (Pty.) Ltd. v. Kempton Park Municipality*, 1956 (1) S.A. 643 (T) at 646-7).

Where there is a continuing cause of action (such as the closing of a road) over a period of time, if any part of the relevant period fell within the six months required, damages for that period may be claimed (*Slomwitz v. Vereeniging Town Council*, 1966 (3) S.A. 317 (A.D.)).

There is nothing in section 172 of Ordinance 17 of 1939 (T) which would **revive** a prescribed claim, if the local authority protected thereby itself after the termination of the six months from the date on which the cause of action arose, instituted an action based on the same events against a party whose claim has become prescribed. But a defence of prescription is incompatible with a claim for apportionment of damages in terms of the Apportionment of Damages Act, No. 34 of 1956 (*Pretoria Stadsraad v. Public Utility Transport Corporation, Ltd.*, 1963 (3) S.A. 133 (T)).

For cases arising under the Motor Vehicle Insurance Act see *post*, p. 518.

(ii) *Provincial Administration*

Some provincial councils have made provisions for the limitation of actions against them (see section 48 of Ordinance No. 6 of 1941 (O), section 99 of Ordinance No. 9 of 1933 (T). In Natal section 34(1) of Ordinance No. 11 of 1942 stipulates that no action may be commenced after the lapse of four months after the date upon which the claimant had knowledge, or could reasonably have had knowledge, of the act or omission alleged.

This protection afforded to a provincial administration is in respect of the actions of every employee, whether an 'officer' or 'beampite' (*Woods v. Administrator, Transvaal*, 1960 (1) S.A. 311 (T) at 317). But such limitation of action applies only to the local authority concerned and does not apply in respect of the employee's own personal liability for his acts or omissions (*ibid.*).

Where an application is made to join the Administrator as a defendant to an action, after the lapse of four months from the stipulated date, the application should be granted unless there is no possibility of success being clearly made out (*Mgobozi v. Administrator, Natal*, 1963 (3) S.A. 757 (N)).

For conflicts between the provincial Ordinance and the Motor Vehicle Insurance Act, see *post*, p. 523.

In the Transvaal section 99(a) of Ordinance No. 9 of 1933 provides that written notice, stating clearly and explicitly the cause of action, must be served upon the Administration within thirty days after the cause of

action arose. The approach to this provision ought not to be too technical and the prescribed notice should be held not to be a compliance therewith only if it fails to set out a cause of action or if it is so wanting in particularity that it is deficient in essentials and, as a consequence, hampers the Administration in the proper investigation of the complaint (*Administrator, Transvaal v. Husband*, 1959 (1) S.A. 392 (A.D.) at 394, cited with approval in *Rondalia Vesekeringskorporasie, Bpk. v. Lemmer*, 1966 (2) S.A. 245 (A.D.) at 258).

(iii) *Railways Administration*

Section 64 of Act No. 70 of 1957 provides that (a) no legal proceedings shall be commenced until one month at least after a written **notice** of intention to commence legal proceedings against the Administration has been served upon it, (b) that such notice by way of a written claim must be lodged with it within a reasonable time and in any event within **four months** of the date of the cause of action, provided, however, that the court may grant relief from this provision if (i) the Administration is in no way prejudiced or (ii) special circumstances existed which reasonably precluded the claim being lodged, and (c) the **action** must be commenced within twelve months after the cause of action arose. It follows that it is necessary for two notices to be filed (*Nach v. S.A.R. & H.*, 1967 (4) S.A. 157 (T) at 160) and it must be clear that the plaintiff intends to take action at law, consequently, merely to state that 'we are holding you responsible for the amount of R662.70' is not a compliance with the relevant section (*ibid.* at 162). In *Botha v. S.A.S. & H.*, 1967 (3) S.A. 695 (G.W.), on the other hand it was held that the correspondence between the parties clearly indicated an intention to litigate and (following *Osler v. Johannesburg City Council*, 1948 (1) S.A. 1027 (W)), where the plaintiff gives his particulars of action and 'substantially' gives notice of an intention to sue, he has sufficiently complied with the terms of the section (*ibid.* at 699). This case also ruled that notice need not be given to the General Manager but may be given to the local System Manager. (See also *ante*, p. 480.)

Pleadings. In *Evert v. Minister for Railways & Harbours*, 1960 (3) S.A. 841 (T) it was ruled that the plaintiff must allege in his pleadings, and also prove in evidence, that the notice required in terms of section 64 has been given and also that he has acted within the time limit prescribed by that section. *Evert's* case has however been criticized and distinguished in *Mgobozi v. Administrator, Natal*, 1963 (3) S.A. 757 (D) at 759, and *Rhame v. The State*, 1963 (3) S.A. 25 (T) at 27 (discussed *ante*, p. 46).

(iv) *Police*

Section 32 of Act No. 57 of 1958 provides that any civil action against the State, or any person in respect of anything done under the Act, shall be commenced within **six months** after the cause of action has arisen, and **notice** in writing of any civil action and the cause thereof shall be given to the defendant **one month** before the commencement thereof.

The word 'commencement' means the issue of the notice and not the service of the summons (*Labuschagne v. Minister of Justice*, 1967 (2) S.A. 575 (A.D.) at 593, following *R. v. Bradshaw*, 1925 C.P.D. 53; *R. v. Fried-*

man, 1948 (2) S.A. 1034 (C), and *Marine & Trade Insurance Co., Ltd. v. Reddinger*, 1966 (2) S.A. 407 (A.D.)).

Notice to the Commissioner of Police is sufficient notice to the State in terms of section 32 of Act No. 7 of 1958 (*Van Biljoen v. Minister of Justice*, 1961 (3) S.A. 586 (T)). Such notice does not require the plaintiff to set out his cause of action in the technical sense of 'cause of action', for all that is required of him is to set out the facts which have given rise to the proposed action to such an extent as to enable the defendant to make the necessary inquiries (*Dease v. Minister of Justice*, 1962 (3) S.A. 215 (T) at 219).

Where an act is done by the police, albeit wrongly, in pursuance of the Act, section 32 applies and the plaintiff may not bring his action after the lapse of six months (*Dineka and another v. Van der Merwe and others*, 1962 (3) S.A. 220 (T); *Karstens v. Du Plessis*, 1964 (1) S.A. 157 (O)). The limitation, it should be noted, applies only to anything done 'in pursuance of the Act'. This is nearly co-extensive with 'in the course of his employment'. In order to ascertain whether this is the case the court will, in its discretion, defer its decision until the evidence of both the plaintiff and the defendant has been heard (*Masikane v. Smit and another*, 1965 (4) S.A. 293 (W)). To act in obedience to the orders of a superior officer, or in obedience to 'standing orders' in the Force, is not to act 'in pursuance of the Act' (*Khoza v. Minister of Justice*, 1965 (4) S.A. 286 (W) at 290). In this case however, it was held that the defendant's policeman, who shot the plaintiff policeman during a 'lark' and while guarding some prisoners, was acting in pursuance of the Act and that the plaintiff was barred by reason of his failing to commence his action within six months.

The barring section 32 has no application, however, where a police officer, having retained a motor-car, refused to return it to the applicant (*Ngubani v. Divisional Commissioner of Police*, 1963 (1) S.A. 316 (W)). Nor does the notice requirement of that section apply in the case of an application for a rule *nisi* calling upon a police officer to release the applicant from custody (*Mkhize v. Swemmer* (2) 1967 (1) P.H., K. 4 (A.D.)).

As to the conflict between the Police Act, No. 57 of 1958, and the Motor Vehicle Insurance Act, see *Minister of Justice v. McAlpine*, 1961 (4) S.A. 396 (A.D.), considered *post*, p. 523.

(v) *Motor Vehicle Insurance Act*

Section 11(2) of Act No. 29 of 1942, as amended by section 9 of Act No. 60 of 1964, provides that the right to claim compensation under subsection (1) (i.e. damages for bodily injury to himself or death or bodily injury to any person due to the negligence or other unlawful act by the person who drove the insured motor vehicle) shall become prescribed upon the expiration of **two years** as from the date upon which the claim arose: Provided that prescription shall be suspended during the period of **sixty** days referred to in subsection (2) of section 11*bis*, which requires that period of notice to be given in writing to the defendant before commencing action (see further *post*, p. 579).

Section 11(2)(b) of the Act provides that, notwithstanding the provisions of section 8 of the Workmen's Compensation Act of 1941, **no action** (under para. (b) of subsection (1) of that section for the recovery of any amount which under that Act is required to be paid to a third party in

connection with the occurrence in question) shall, after the expiration of the said period of two years, be instituted against the registered company: Provided that if the recovery of any such amount has been debarred under this paragraph, any compensation thereafter awarded to a third party under this Act shall be reduced by the amount in question.

Analysis and Interpretation

'Any Action.' Proceedings seeking leave to sue *in forma pauperis* are not part of the action since they are brought before the action. Nevertheless, if the applicant's claim has already been prescribed, a plea in bar based on prescription, should be upheld (*Kok v. Guardian Assurance Co., Ltd.*, 1961 (1) S.A. 48 (E) at 51).

'Registered Company.' Although section 11(2)(a) speaks of a 'registered company' yet the owner of an unregistered company (e.g. the State, Government or body of persons corporate in terms of section 19(3) which is a self-insurer) is in the same position as a registered company and, consequently, the prescriptive period of two years is suspended for sixty days in the case where the prescribed notice, in terms of section 11*bis*, has been served (*Durban City Council v. Ndhlovu and others*, 1968 (4) S.A. 718 (A.D.), overruling the decision in *Botha v. Parity Insurance Co., Ltd.*, 1968 (1) S.A. 54 (W)).

If the registered company is unable to pay any part of the compensation the claimant is entitled to sue and recover that part from the owner or, driver (*Louwrens v. Amery*, 1965 (1) S.A. 477 (W)). Procedurally, it is merely a matter of his alleging and proving such inability to pay and it is not essential that the said company first be excused (*ibid.*, at 479). If the amount of the alleged deficiency is not set out in the summons the court may allow an amendment thereto rather than to cancel it (*ibid.*, at 481).

Prior Demand Notice. Section 11*bis*, as inserted by section 3 of Act No. 14 of 1966, provides that a claim for compensation shall be set out on the form prescribed by regulation in such manner as may be prescribed and shall, accompanied by such medical report or reports as may be prescribed, be sent by registered post or delivered by hand to the registered company at its registered office or local branch office, and the registered company shall, in the case of delivery by hand, at the time of delivery acknowledge receipt thereof and the date of such receipt in writing. The 1966 amendment appears to have been designed to overrule the effect of the decision in *Rondalia Versekeringskorporasie van S.A., Bpk. v. Lemmer*, 1966 (2) S.A. 245 (A.D.), wherein it was held that the Minister had no power to issue regulations obliging the plaintiff to have himself medically examined and to oblige him to get the medical practitioner to draw up a report. Nevertheless, even under the present section 11*bis*(1), it has been held that the provisions are directory rather than peremptory and that a substantial compliance with the regulation is all that is required (*Lansberg v. New India Assurance Co. (Pty.) Ltd.*, 1969 (1) S.A. 110 (D), following *Lemmer's* case (*supra*)). Consequently, while a medical report is now compulsory, the Minister has no power to require that the claim be supported by affidavit (*ibid.* at 114). In *Lansberg's* case the formal claim was accompanied by a letter which gave the defendant company sufficient particulars and

details of the claim and here it was ruled (at 115) that the two documents, read together, constituted a sufficient compliance with section 11*bis*.

Purpose of Notice and Service of Summons. Section 11*bis*(2), as inserted by section 10 of Act No. 60 of 1964, provides that no claim against a registered company shall be enforceable by legal proceedings commenced by summons **served** upon it before the expiration of the sixty days' notice in the manner provided above. The purpose of precluding the service of a summons before the lapse of the sixty days' notice is to give the insurance companies time within which to consider the plaintiff's claim before becoming involved in litigation (*Lemmer's case (supra)* at 256). It follows that a premature service of a summons on a claim is unenforceable (*Santam Insurance Co., Ltd. v. Vilakazi*, 1967 (1) S.A. 246 (A.D.) at 252). Nor would such premature service be effective for the purpose of interrupting the running of prescription against the claimant (*Ndandani v. Royal Insurance Co., Ltd.*, 1966 (3) S.A. 575 (E) at 576). However, although the intention of the legislature is to bar the institution of legal proceedings pending the expiration of the sixty days' notice, the relative enactment does not prevent the plaintiff from **re-serving** a prematurely issued summons, after the lapse of the sixty days period and without the leave of the court (*Marine & Trade Insurance Co., Ltd. v. Reddinger*, 1966 (2) S.A. 407 (A.D.) at 413). Consequently a summons is not invalid merely because it was **issued** before the expiration of the sixty days, provided it is not **served** on the defendant within that time (*Bore v. Parity Insurance Co., Ltd.*, 1965 (2) S.A. 75 (O) at 77). From the above-mentioned decisions it would appear that, while a summons, served prematurely, is a nullity there would be no valid objection to another summons, identical in form and content, being issued later and served upon the defendant after the lapse of the sixty-day period of notice required but before the prescriptive period of two years has expired. (See *Djaperides v. Federal Insurance Corporation of S.A.*, 1955 (2) S.A. 396 (W), but not for the reasons stated therein, and *Marine & Trade Insurance Co., Ltd. v. Reddinger (supra)*.)

Amendment of Summons. Once a summons has been timeously served there is nothing in law to prevent an amendment to the particulars and details of the plaintiff's claim so as to increase the amount of damages sought provided that the original cause of action, or the nature of the claim, is not thereby altered or varied (*Sheriff v. Royal Insurance Co., Ltd.*, 1952 (4) S.A. 263 (C), and *Wigham v. British Traders Insurance Co., Ltd.*, 1963 (3) S.A. 151 (W) at 152-3), for it was not the intention of the legislature that no amendment of a summons claiming damages should be granted before the form MVA has first been amended. Nor was its intention that sixty days had to elapse before an amendment of the particulars of a claim could be granted (so long as a new claim is not introduced) (*Boti v. Unie en Nasionale Versekeringsmaatskappy, Bpk.*, 1968 (4) S.A. 567 (O) at 569-70).

Computation of Period of Prescription. In computing the period of the prescription of **two years** the ordinary civil rule (which includes the first day and to midnight on the last day and also includes Sundays and public holidays) is to be applied in preference to section 4 of the Interpretation Act, No. 33 of 1957 (which excludes the first day and includes the last day

unless the last day is a Sunday or a public holiday, which also has to be excluded) (*Kleynhans v. Yorkshire Insurance Co., Ltd.*, 1957 (3) S.A. 544 (A.D.) at 767); *Somdaka v. Northern Assurance Co., Ltd.*, 1961 (4) S.A. 764 (D); *Thomas v. Liverpool & London & Globe Insurance Co. of S.A., Ltd.*, 1968 (4) S.A. 141 (C)). In *Kleynhans's* case, where an accident took place on 6th March, 1954, and where summons was not served until 6th March, 1956, it was held that an exception, by the plaintiff to the defendant's plea of prescription, had rightly been dismissed. It follows that if the last day is a Sunday or a public holiday the summons must be issued on, or before, that day (*Somdaka's* case (*supra*)), but it can be served on a Sunday only by order of court (*Ex parte Reynecke*, 1966 (3) S.A. 308 (N)). In *Wulfes v. Commercial Union Assurance Co. of S.A., Ltd.*, 1969 (2) S.A. 32 (N), a collision had occurred on 13th February, 1966, and plaintiff's claim for compensation, in terms of section 11*bis*, had been delivered to the defendant on 12th February, 1968. Summons was served on the defendant on 13th April, 1968, and again on 16th April, 1969, and it was held that, since the two-year period of prescription for the service of the summons had expired at midnight on 12th April, both summonses were invalid since they had been served before the lapse of the sixty-day period of notice required by the Act (at 38-40). Had the notice of claim been lodged timeously it would have extended the two-year period of prescription by some sixty days, but the position was otherwise in this case (*ibid.*).

In computing the period of sixty days, within which the notice of claim must be served upon the defendants, it has now been ruled (Steyn C.J. and Rumpff J.A. dissenting) that the civilian method of calculation is to be followed and that section 4 of the Interpretation Act, 33 of 1957, is not applicable (*S.A. Mutual Fire and General Insurance Co., Ltd. v. Fouche*, 1970 (1) S.A. 302 (A.D.), reversing the decision of Fannin J. in *eo nomine* 1969 (2) S.A. 519 (N) and confirming the decision in *Tlabakoe's* case, 26/3/1966 W.L.D., which followed the decision of Corbett J. in *Thomas v. Liverpool & London & Globe Insurance Co. of S.A.*, 1968 (4) S.A. 141 (C)). In other words, the first day must be included and the last day excluded and no relief is afforded to the plaintiff if the last day is a Sunday or a public holiday. It is respectfully submitted that the reasoning of Steyn C.J. and Rumpff J.A. is correct and that, in view of the conflict of judicial opinion in this regard, the legislature should clarify its intention in section 11(2) of the Motor Vehicle Insurance Act, 29 of 1942. Until it does so, however, the provisions of the Interpretation Act must be disregarded and the civilian rule applied.

Injured Party Only. It has been held that the prescriptive period of two years applies only to the person claiming damages, based on negligence, from an insurance company (or registered body under the Act) and, consequently, a party who has supplied accommodation, treatment, services or goods to an injured party is not bound by this prescriptive bar since the claim is based on a contractual right of action which the supplier would have had against the injured party and, therefore, as against the insurance company, hence the only Prescription Act, No. 18 of 1943, applies (*Administrator, Transvaal v. A.A. Mutual Insurance Association, Ltd.*, 1960 (4) S.A. 525 (T)). But see now section 11(2)(b).

Company or Registered Body Only. The fact that the period within which a plaintiff may sue an insurance company, or registered body of persons, has expired does not debar him from instituting proceedings against the insured wrongdoer personally since section 11*bis* protects only a registered company and if the legislature had intended to give the same protection to the wrongdoer himself it would surely have said so in section 19(3) of the Act (*Botha v. Parity Insurance Co., Ltd. and others*, 1968 (1) S.A. 54 (W) at 55).

Application of the Prescription Act, No. 18 of 1943. This Act may conveniently be dealt with under four headings, namely (1) the meaning of 'disability', (2) the position of minors, (3) liquidation, and (4) admissions.

(1) **'Disability.'** Under section 7(1)(b) prescription is interrupted by reason of the disability of the plaintiff. This means a **legal** disability or incapacity, i.e. some impediment which prevents a man from asserting his right, and the term does not, therefore, include a physical disability or impediment by reason of the fact that the plaintiff was in hospital at the time and was, for some fifteen days, in an unconscious state after he had become aware of his rights (*Wulfes v. Commercial Union Assurance Co. of S.A., Ltd.*, 1969 (2) S.A. 31 (N)).

(2) **Minors and Minority.** In *Mofokeng N.O. v. National Employers Mutual General Insurance Association, Ltd.*, 1952 (4) S.A. 239 (W), Claydon J. delivered the rather startling ruling that, upon a proper reading and interpretation of the terms of the Motor Vehicle Insurance Act, the period of prescription would operate as a bar to a claim by a minor in law after the lapse of two years after the cause of action, but this decision has been dissented from by the Appellate Division in *President Insurance Co., Ltd. v. Yu Kwam*, 1963 (3) S.A. 766 (A.D.) at 781-2. It is clear therefore that both *Mofokeng's* case and the decision in *Richter v. Capital Insurance Co., Ltd.*, 1963 (4) S.A. 910 (E), which followed it, would now be non-applicable in this regard. Accordingly since a Bantu woman is a minor in terms of section 11(3) of the Native Administration Act, No. 38 of 1927, prescription does not run against her during her minority (*Bolo v. Royal Insurance Co. of S.A., Ltd.*, 1969 (3) S.A. 102 (E)). If it is the minor who is the claimant, and not his guardian, he cannot be barred by the provisions of section 34(1) of Ordinance No. 11 of 1942 (Natal) (*Greyling v. Administrator, Natal*, 1966 (2) S.A. 684 (D)).

(3) **Liquidation of a Company.** Under section 7(1)(a) of Act No. 18 of 1943 prescription is suspended by a court order placing a company under liquidation. The effect of that order against a company, which is an insurer in terms of the Motor Vehicle Insurance Act, No. 29 of 1942, as amended, is therefore to suspend extinctive prescription in regard to any claim against the company until confirmation of the distribution account takes place (*Parity Insurance Co., Ltd. (in liquidation) v. Mchunu*, 1967 (2) S.A. 459 (A.D.)). Here it was held that the service of the required notice operates both to interrupt prescription and also to suspend the prescription of sixty days under section 11*bis* of Act No. 29 of 1942.

(4) **Admissions of liability.** In terms of section 6(1)(a) of the Prescription Act extinctive prescription is interrupted by a verbal acknowledgment of liability. An insurance company under the Motor Vehicle Insurance Act

would therefore be bound by this provision if such admission were made by its properly authorized officer, but it would not be bound by an acknowledgment of liability if made by a representative who had no authority to do so, e.g. by an independent assurance assessor engaged by the company to investigate a claim (*Kapeller v. Rondalia Versekeringskorporasie van S.A., Bpk.*, 1964 (4) S.A. 722 (T)).

Conflict of Laws

(1) **The Provincial Ordinances.** Where a Provincial Administration is its own insurer, a plaintiff is not governed by the prescriptive period of ninety days within which to institute his action in terms of section 90 of Ordinance No. 22 of 1957 (T), but he is entitled to institute proceedings for damages within the period of two years as provided for by the Act, since the Act overrules the Ordinance (*Theron v. Pretoria City Council*, 1955 (2) S.A. 255 (T); *Natal Provincial Administration v. Buys*, 1957 (4) S.A. 646 (A.D.)). Nevertheless it has been held that the prescribed **notice of action** procedure was still applicable and that a person who had failed to lodge the said notice within thirty days could competently be met with a plea in bar (*Faguti v. Administrator, Transvaal*, 1960 (4) S.A. 515 (T)). In this case it was held that the statement of Malan J.A. in *Administrator, Transvaal v. Husband*, 1959 (1) S.A. 392 (A.D.), was an *obiter dictum* and not binding upon the court. It is submitted, however, that in view of the subsequent section 11*bis* to the Act, the thirty days' notice required by the Ordinance has also been replaced by the Act which stipulates for 60 days' notice to be given. (Cf. *Parity Insurance Co., Ltd. (supra)*.)

(2) **The Police Act.** Section 32 of the Police Act, No. 57 of 1958, which provides that action shall be 'commenced' within six months of the date of the cause of action, does not apply when the plaintiff is suing under the provisions of the Motor Vehicle Insurance Act, No. 29 of 1942, since section 19(3) applies *mutatis mutandis* to 'any state, government or body of persons which owns a motor vehicle which is not insured under the Act'. Consequently, the period of prescription for a person who has been injured negligently by a police vehicle driver is two years (*Minister of Justice v. McAlpine*, 1961 (4) S.A. 396 (A.D.) at 400-1).

(3) **Workmen's Compensation Act**, No. 30 of 1941. It has been held that a claim by the Workmen's Compensation Commissioner, under section 8(1)(b) of the Act, to recover from a third party the amount paid by him to a workman, is not a 'claim for compensation' in terms of section 11(i) of Act No. 29 of 1942 and that the prescriptive period of two years does not apply to him (*African Guarantee & Indemnity Co., Ltd. v. W.C.C.*, 1963 (2) S.A. 636 (A.D.)). But the effect of this decision has been swept away by section 11(2)(b) of the Act (see *Minister of Justice v. Johannesburg City Council*, 1968 (4) S.A. 295 (W)). In this case the Commissioner claimed to be reimbursed in respect of a sum paid by him to two constables who had been injured by a motor cycle negligently driven by an employee of the defendant municipality, in terms of section 8(1)(b) of the Act No. 30 of 1941, the defendant being deemed to be an insurer under the Act. The cause of action arose on 11th May, 1963, but the summons was not served until 19th January, 1967, and the defendant pleaded prescription under

Act No. 29 of 1942. To this plea the Commissioner excepted, saying that his claim arose only from the date upon which he had paid the injured workmen (the constables) or, alternatively, on the date when the final award had been made to them. Held, that the Commissioner's exception should be dismissed. It follows that the prescriptive period of two years set out in the Motor Vehicle Insurance Act applies to the Workmen's Compensation Act.

As against the person causing injury the damages which a workman may claim is only the difference between his award under the Workmen's Compensation Act and the sum of R8,000 (see section 9 of Act No. 60 of 1964 which renders the decision in *Workmen's C.C. v. Commercial Union Assurance Co., Ltd.*, 1964 (4) S.A. 741 (W), inapplicable). See also *Annual Survey*, 1964, pp. 148-50, and *Vogel v. S.A. Railways*, 1968 (4) S.A. 452 (E).

The Motor Vehicle Insurance Act has, obviously, no application in respect of damages which are not claimable under its provisions (*Rose's Car Hire (Pty.) Ltd. v. Grant*, 1948 (2) S.A. 466 (A.D.)) although, as against his **employer**, the workman has no action for general damages (i.e. damages which fall outside the scope of the Workmen's Compensation Act) (*Pettersen v. Irvin & Johnson, Ltd.*, 1963 (3) S.A. 255 (C)).

Waiver. The matter of waiver has been discussed *ante*, p. 46. The submission there made has now been supported by the decision in *Minister of Justice v. Swanepoel*, 1968 (1) S.A. 347 (S.W.), wherein it was ruled that the State can competently waive its right to proper notice although the onus rests upon the claimant to prove such waiver by a balance of probabilities.

Estoppel. Having been notified timeously of the occurrence of an accident or damage, it sometimes happens that the insurance company takes some considerable time in making up its mind whether or not to 'disclaim liability' under the policy and thereby overtly leads the insured person into the belief that it either intends to assume liability or has, in fact, done so. Such a position arose in *Resisto Dairy (Pty.) Ltd. v. Auto Protection Insurance Company, Ltd.*, 1963 (1) S.A. 632 (A.D.), where it was held that, although the company was entitled to repudiate liability by reason of a failure on the part of the insured person to give timeous notice, it did not do so within a reasonable time nor did it inform the claimant that it required time to consider his claim but, on the contrary, it remained silent and it was not until some seven months later that it mentioned the possibility that it might repudiate liability on his claim. Here it was held that its **silence** and **inaction** in the circumstances and over such a lengthy period constituted a representation of waiver to the claimant and, since the claimant had refrained from taking any steps, in regard to a claim made against it by an injured party, it had been prejudiced thereby: Accordingly the insurance company was estopped from relying on the prescriptive clause in the agreement of insurance.

INSURANCE CONTRACTS

The decision in the *Resisto Dairy* case (*supra*) is, therefore clear warning to defendants who seek to rely on either statutory or contractual limitation of actions, that purposeful silence and **designed inaction**, which misleads a

claimant into the reasonable belief that his claim will, or is about to be, satisfactorily settled in his favour, may well result in an estoppel arising if the claimant has been legally prejudiced thereby. The same consideration would arise in cases where an insurance company did not timeously give a positive answer as to whether it agreed to arbitration, as a condition precedent, or waived its rights thereunder (cf. *Estate Jonker v. Liverpool & London & Globe Insurance Co., Ltd.*, 1939 A.D. 340), but it is for the claimant to initiate steps for arbitration (*ibid.*, at 349). Once he does demand arbitration, the prescriptive period of three months is suspended until the arbitration has been decided (*ibid.*, at 350). An insurance company is not entitled to deny the existence of a policy and at the same time to hold the insured bound by its terms for, having taken one course, it will be estopped from pursuing the other course (*Collen v. A.A. Mutual Insurance Association, Ltd.*, 1954 (3) S.A. 625).

In this regard it should be noted that a contractual limitation of action, creating an absolute bar to an action unless it is instituted within a specified period, is not 'Prescription' in the statutory sense, since the statute merely bars the action but does not dissolve the natural right, which can form the basis of a set off (*Estate Jonker's case (supra)* at 351) and *Adriatic Insurance Company v. O'Mant*, 1964 (3) S.A. 292 (S.R.) at 294).

O'Mant's case bears a close resemblance with the facts and decision in the *Resisto Dairy* case (*supra*), inasmuch as the plaintiff had written to the defendant's attorney asking whether or not the dispute between his client and the defendant insurance company would be referred to arbitration in terms of a clause in the policy. He also asked the defendant whether the latter would be agreeable to accepting the jurisdiction of the magistrate's court, since the amount claimed (some £300) was in excess of the court's jurisdiction. No reply was sent to *O'Mant's* two letters save a letter saying that the defendant's attorney 'had not yet obtained his client's decision' to the requests and the magistrate held that there was an implied representation that the summons need not be issued until an agreement or disagreement had been reached, on the negotiations taking place. (See *Garlick Bros. v. Phillips*, 1949 (1) S.A. (A.D.), at 132, citing *Hughes v. Metropolitan Railway Co.*, 2 A.C. 429, and the *Resisto Dairy* case (*supra*)). The Court found, however, that no estoppel had arisen, since the plaintiff had taken no action upon his belief, and that the *exceptio doli* raised by the plaintiff, could not be upheld (at 299). This decision is questionable, since (a) it was based on the finding that the defendant was under no obligation to reply thereto (at 299), but there surely was an obligation upon it to reply to the question of arbitration, which was a condition precedent to legal proceedings in its own insurance policy; (b) in holding that the plaintiff 'did not start some positive action', whereas it is clear that estoppel can arise when a misled party **refrains** from taking such action as he would otherwise have taken (see *Spencer Bower on Estoppel*, 2nd ed., at 262) and (c) in holding that the *exceptio doli* did not arise in this case, whereas the subsequent decision in *Trust Bank van Afrika v. Eksteen*, 1964 (3) S.A. 402 (A.D.), specifically declares that our law of estoppel is fundamentally based on the *exceptio doli* and, in this respect it departs from the objective approach of English law in postulating an inquiry also into the subjective state of mind of the representor: Consequently, while

the English decisions on estoppel are informative, they are not binding upon the South African courts. See also *Johaadien v. Stanley Porter (Paarl) (Pty.) Ltd.*, 1970 (1) P.H., F. 5 (A.D.).

A clause in an insurance policy, requiring notice to be given to the insuring company by an insured person, is not complied with if it is lodged by the attorney of a third party who is suing the person insured (*South British Insurance Co. v. Patel & Co.*, 1959 (4) S.A. 500 (S.R.)).

SCHEDULE 'A'

STOPPING DISTANCES AT DIFFERENT SPEEDS FOR
TESTING AUTOMOBILE BRAKES

RAYBESTOS—BELACO LTD., LONDON

Stopping Distance with Two Wheel Brakes (at 60 per cent efficiency)

<i>Speed in m.p.h.</i>	<i>Stopping distance in feet</i>
10	9·3
15	20·8
20	37
25	58
30	83·3
35	113
40	148
45	188
50	232

Stopping Distance with Four-wheel Brakes

10	5·6
15	12·5
20	22·2
25	34·7
30	50
35	68·2
40	89
45	112·8
50	139

(To be proved by expert evidence in each case. *R. v. Phillips*, 1949 (2) S.A. 671, and *ante*, p. 254.)

SCHEDULE 'B'

CRIGGMAY'S TABLES FOR TIME, SPEED AND DISTANCE
SPEED CONVERSION TABLE

<i>Miles per hour</i>			<i>Feet per minute</i>			<i>Feet in second</i>
1	..	..	88	..	..	1·5
2	..	..	176	..	..	2·9
3	..	..	264	..	..	4·4
4	..	..	352	..	..	5·9
5	..	..	440	..	..	7·3
10	..	..	880	..	..	14·7
15	..	..	1,320	..	..	22·0
20	..	..	1,760	..	..	29·3
25	..	..	2,200	..	..	36·7
30	..	..	2,640	..	..	44·0
35	..	..	3,080	..	..	51·3
40	..	..	3,520	..	..	58·7
45	..	..	3,960	..	..	66·0
50	..	..	4,400	..	..	73·3
55	..	..	4,840	..	..	80·7
60	..	..	5,280	..	..	88·0

(The figures in Schedule 'B' need not be proved in evidence since they are a matter of mathematical calculation.)

See also Metcalf in Cooper and Bamford's *S.A. Motor Law*, pp. 791-9.

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